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13 October 2020

Dear Sir or Madam,

RE: CITY OF LONDON LAW SOCIETY'S RESPONSE TO HMRC'S CALL FOR EVIDENCE IN RELATION TO THE MODERNISATION OF THE STAMP TAXES ON SHARES FRAMEWORK

Please find below The City of London Law Society's ("**CLLS"**) response to the HM Revenue & Customs ("**HMRC**") call for evidence entitled Modernisation of the Stamp Taxes on Shares Framework (the "**Call for Evidence**").

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. The current members of the committee are herewith:- http://www.citysolicitors.org.uk/clls/committees/revenue-law/revenue-law-committee-members/

1. If you were designing a STS regime from scratch what would your top design principles be? What would you like a new STS regime to deliver?

Our view is that a modern STS regime should:

a) be set out in clear, modern drafting in one consolidated piece of legislation;

b) provide for the stamp duty process to be digitised, removing the need for physical stamping, using an online system which provides taxpayers with a unique transaction reference confirming that the transaction has been notified to HMRC;

c) combine the existing stamp duty and SDRT regimes, so as to subject securities held in both materialised and dematerialised form to a single tax (albeit with some necessary differences reflecting the differences between the nature of the transactions that are typically entered into for the transfer of those securities);

d) not materially disrupt the current systems and procedures that are in place in relation to the administration of SDRT for dematerialised securities through CREST;

e) provide for an assessable tax which is charged on the transferee by reference to a clearly identified charging point, with appropriate penalties for non-compliance;

f) be governed by a modern self-assessment, enquiry and appeals process with: (i) a digital self-assessment process which does not require underlying documents or supporting materials to be sent to HMRC except in relation to matters which are subject to enquiry; and (ii) the modern appeals process which applies for other UK taxes, rather than one which works off of a case stated by HMRC;

g) provide for reliefs to be applied for on a self-assessment basis, subject to the enquiry and appeals process, with an optional statutory clearance process for obtaining adjudication on the availability of relief in advance of a transaction taking place;

h) not be the cause of any delay in updating company registers, and not be a barrier to the development of legal technology in terms of the manner in which instruments of transfer may be executed in the future;

i) not prevent any documents being provided as evidence in the context of English proceedings or being used for any other purpose (including for Companies House purposes in a takeover context), in each case regardless of whether or not the associated stamp duty has been paid;

j) avoid the technical possibility of double charges by clearly differentiating between the charges which apply to materialised securities as compared to dematerialised securities, with no overlap;

k) have a clearly defined territorial scope which excludes the transfer of non-UK securities;

l) clearly define the types of transactions which fall within the scope of the tax; and

m) adopt a money or money's worth definition of consideration, subject to a reasonable estimate, true-up and deferral mechanism (similar to that used in an SDLT context) to deal with unascertainable consideration or unascertained but ascertainable consideration.

2. Do you have experiences of how tax on securities is implemented/collected in other (overseas) tax systems? Do you consider any of these other ways of collecting tax on securities to be more efficient or easier to use?

We have no particular comments to make, except to say that we think that all of the "design principles" we have mentioned in answer to question 1 can be achieved by borrowing concepts from existing UK legislation.

3. What are your views as to the priority which should be given to elements in any modernisation programme? This will encompass any views on which areas currently cause most problems and which areas would rely on other elements being addressed first.

As we explain below, we are in favour of rewriting the stamp duty legislation and combining stamp duty and SDRT into a single tax. It would be very difficult, in our view, to achieve this rewrite in stages.

Many of the changes (for example, moving to a unique transaction reference system) are conditional upon stamp duty becoming an assessable tax and we acknowledge that there would be too high an enforcement risk of proceeding with these changes without making the tax assessable.

However, we do think it would be possible to significantly clarify the territorial scope of stamp duty through a simple legislative change. This could be done in advance of a broader rewrite of the legislation (which we acknowledge could take some time) and should resolve some of the issues which arise from the current broad territorial scope of stamp duty (which are set out in detail in our response to question 5 below).

We have in mind a simple change to section 14(4) Stamp Act 1891 so that it reads as follows:

> "*An instrument wheresoever executed which relates to any property situate in any part of the United Kingdom shall not, except in criminal proceedings, be given in evidence, or be available for any purpose whatever, unless it is duly stamped in accordance with the law in force at the time when it was executed.*"

This would retire the broad "matter or thing done or to be done in the UK" test. However, territorial issues would remain which may need to be clarified through guidance e.g. to confirm that it is not expected that UK stamp duty would be paid on the transfer of non-UK shares (notwithstanding that it would technically still be payable on all transfers of stock and marketable securities) and that penalties would not be applied in practice if such transfers were executed and/or brought into the UK. These remaining points illustrate that this change to section 14(4) is not a perfect fix.

As part of the rewrite, and making stamp duty an assessable tax, we would hope that section 14(4) would be repealed and that the interaction between stamp tax and evidence in civil proceedings would be confined to the history books. But, in the meantime, this change would offer shorter term benefits for practitioners and their clients without a material impact upon Government resources.

We discuss further below our view of the changes that have been put in place to deal with the Covid-19 situation, and we think a move away from physical stamping has generally been a welcome one (although the system has not been without its issues). We would be in favour of this process being set on a statutory footing such that physical stamping would not be required going forward. In particular, we would hope that the legislation would make clear that an instrument is duly stamped or adjudicated as eligible for relief (for all purposes, including for the purposes of franking the SDRT charge) on receipt of a letter from HMRC confirming that the stamp duty has been paid or adjudicating the relief. We would expect these changes to be retrospective, so that it is made clear beyond doubt that any documents submitted for stamping on or after the date on which the Covid-19 processes were put in place do not need to be re-submitted for physical stamping in order to be treated as duly stamped.

We mention below (in response to question 26) that the repeal of section 117 Stamp Act 1891 would be welcomed. This is a somewhat smaller point, but it is one that

stands alone and would be straightforward to deal with and therefore (it seems to us) could be dealt with early as part of this suite of changes.

4. Taking into account the areas discussed in this call for evidence (and any other areas you think are relevant) we would be grateful for any views on the impacts, benefits or drawbacks of combining (as far as possible) Stamp Duty and SDRT as part of modernising the Stamp Duty regime.

We agree with the OTS that the stamp duty and SDRT regimes should be combined into one consolidated STS regime under Finance Act 1986 (***FA 1986***), with the remaining stamp duty legislation being repealed.

The current stamp duty legislation is very fragmented across many Finance Acts (with no sign-posting to assist the reader). It dates back to 1891 and the terms used are often arcane. Important principles (such as the contingency principle) are derived wholly from case law and have not been put on a statutory footing, whereas the wait and see principle for unascertained but ascertainable consideration is found only in HMRC concessionary guidance. For all of these reasons, the legislation can be difficult to work with and is ripe for modernisation.

We have set out in response to question 1 the key aspects that we would like a new STS regime to deliver, and much of this can be achieved by extending the application of the existing SDRT legislation to shares held in materialised form. In particular, SDRT is already an assessable tax with a clear scope. As we explain further in response to question 5 below, our view is that the scope of stamp duty should generally be aligned with the current scope of SDRT.

We agree with the OTS proposal of fixing the charging point for the combined tax as the date of substantial performance of an agreement to transfer securities. As the OTS outline at paragraph 3.47 of their paper, that should in practice give rise to very little practical change to the charging point for the transfer of both materialised and dematerialised securities, whilst neatly preserving the anti-avoidance role currently played by the SDRT regime in relation to 'rest on contract' planning.

However, combining the two regimes will need to be carefully thought through, including in particular the following aspects:

Self-assessment / notification process

The CREST mechanisms for notifying and collecting SDRT on dematerialised securities are well-understood and, in our view, should not be changed (save for any small changes that may be required in relation to the claiming of reliefs – see below).

We agree with the OTS proposal for the self-assessment process for stamp duty on materialised securities. The OTS proposed the introduction of an online return system, similar to that used currently for SDLT, through which the key details of the transaction can be recorded and a unique transaction reference (***UTR***) can automatically and immediately be provided. That UTR could then be used as a reference number when making the stamp duty payment and provided to the company registrar as evidence that the transaction has been notified. On receipt of the UTR and the stock transfer form, the company registrar would be able to update the company register. As for SDLT, the online system should also be available – and a UTR generated – where a relief is being claimed. No underlying documents (whether in hard copy or electronic

form) would need to be sent to HMRC as part of this notification process, and no physical stamps would be applied. The stamp machines could therefore be retired, and stock transfer forms could be executed electronically.

HMRC should have the power to enquire into that online return and to request supporting information and documentation as part of that enquiry process.

If the online return is simple and straightforward to fill in, then this system should be much quicker and more efficient for taxpayers and their agents and for HMRC. Original documents would no longer be lost in the post or be mislaid, and section 12A of the Stamp Duties Management Act 1891 which provides for missing documents to be re-executed and sent to HMRC solely for stamping purposes would no longer be required. It would also effectively deal with many of the practical issues that arise in the context of public takeovers (which were explained in further detail in the IFS paper by Sara Luder entitled "The Case for the Abolition of Stamp Duty"[1]).

Most importantly, this would eliminate the delay between submission to HMRC and the updating of the company register, which can cause significant issues in practice. It is not unusual for the prompt updating of the company register to be time critical in the context of public takeovers, IPOs and intra-group reorganisations and also where financing documents require legal title to be transferred within a particular period of time.

Under the current system, concerns in relation to a delay can sometimes be addressed by a declaration of trust structure under which the beneficial interest to the shares is transferred by way of a declaration of trust (which is the instrument of transfer to be sent to HMRC for stamping), with the legal title to the shares being transferred separately for nil consideration under a stock transfer form. The stock transfer form does not need to be stamped and therefore can be used to update the company register immediately. However, this is not a straightforward structure to describe to international clients and can be costly to put in place.

It also does not assist in certain situations, for example in a public takeover context where declarations of trust are rarely used. We further understand that HMRC's view is that where a section 77 relief claim is to be made (for example, in an IPO context) then a declaration of trust structure ought not to be used except in exceptional circumstances.

In these situations, arrangements must be made with HMRC for stamping to take place as soon as possible. This can be a time-consuming exercise particularly on complicated public transactions. For example, we are aware of a public takeover where it was deal critical for the stock transfer form to be stamped within 24 hours. A lengthy protocol was agreed with HMRC to facilitate this – under which penny tests and a dummy run were conducted and legal representatives from both parties were required to travel to Birmingham overnight to attend an 8am stamping appointment. There is also an example of the updating of the company register being delayed on a public takeover because the stamp duty payment (a very large sum, which was paid in good time) could not be identified by the Stamp Office before the stamping machines were

[1] https://www.ifs.org.uk/uploads/publications/TLRC/r123.pdf

turned off for cleaning at 2pm. These sorts of situations damage the UK's reputation as an international business hub.

Under the proposed self-assessment and UTR system, declarations of trust and protocols would not be required. The taxpayer's agent would simply file a return online, receive the UTR, and use that to update the register straight away.

Company registers

The above assumes that company registrars would need to have sight of the UTR in order to update the register of members, rather than just being able to go ahead on the basis of an executed stock transfer form.

This seems to us to be the right approach, on balance, assuming that the new system allows for the UTR to be issued immediately and automatically thereby eliminating the timing issues described above. Currently, as the OTS recognises in its report, the prohibition on updating the company's register without a stamped stock transfer form (in section 17 Stamp Act 1891) is one of the three key reasons why people currently pay stamp duty. It also (in practice) serves as a helpful reminder that stamp duty is required to be paid and we think that retaining the role of the registrar should help to ensure that stamp tax obligations are not inadvertently forgotten (to the benefit of both HMRC and taxpayers).

Reliefs and exemptions

As explained further in our response to question 5 below, if the scope of stamp duty and SDRT is to be aligned and the existing stamp duty legislation repealed then sub-sections 99(5) and 99(5A) will need to be rewritten to exclude specifically the transactions which – under the current regime – would be exempt from all stamp duties. This would need to include: (i) exempt loan capital (per the existing rule in sections 78 and 79 FA 1986); (ii) transfers where the consideration is less than £1,000; (iii) non-marketable debentures. In order to avoid a significant increase in administrative burden on both HMRC and taxpayers, we think it is right that exempt transfers are not made subject to the notification requirements described above. Instead, self-certification should continue to be relied on (including by registrars) in relation to transfers of securities for consideration of less than £1,000, and reporting should continue not be required for other exempt transfers.

With respect to reliefs more generally, our view is that these should be replicated in the new combined STS legislation and be claimable through the online return system. This could either be a simple process of selecting the relief that applies (as on an SDLT return) or, it could require a taxpayer to answer some confirmatory questions through a series of tick boxes (in which case there ought to be a white box available for disclosures to be provided). It would be useful if taxpayers were nevertheless still able to request advance clearance (whether on a statutory basis or otherwise) that a particular relief will apply to an anticipated transaction, with provision on the online return to attach that advance clearance. HMRC are currently generally prepared to consider "dummy run" applications for relief, and the certainty that this provides to taxpayers where the sums involved are potentially significant is very valuable. HMRC should then have enquiry powers in relation to relief claims.

This simple process would be a significant improvement on the current system for claiming stamp duty relief, which involves sending a detailed letter to HMRC together with supporting evidence. Whilst HMRC set out on their website what they expect to see included in that detailed letter, the form of that letter and the level of detail provided can vary between advisors which we expect may be difficult or inefficient for HMRC to work with. An online process would harmonise the approach and should therefore be more efficient for both HMRC and taxpayers.

The supporting evidence required by HMRC in respect of a group relief claim, for example, includes (among many other things) details of the authorised and issued share capital, including the share rights if more than one class, of each company in the chain between transferor and transferee. Temporarily, as a result of the Covid-19 measures that have been put in place, HMRC are not requiring copies of full registers of members for each company in the chain, although this is usually what they require.

The time spent (and therefore the cost to our clients of) preparing a group relief application and preparing the supporting documents can be significant, particularly where there are a significant number of companies in the intermediate chain between transferor and transferee. We have, on occasion, advised our clients to pay stamp duty because it would be cheaper to do so than to claim the relief. We would expect that the move to a modern assessable tax and enquiry system should give HMRC sufficient comfort such that the requirement to provide supporting evidence along with the claim for relief could be dispensed with (as is the case for SDLT).

The approach to reliefs on transactions in dematerialised securities can also be simplified significantly. We agree with the OTS that the group relief and reconstruction stamp duty reliefs (which would apply to SDRT under the combined STS legislation) could be claimed through CREST flags and that relief claim then being notified to HMRC via CREST. This would avoid the creation of paper instruments solely for the purpose of being able to claim these reliefs, and therefore would reduce administrative cost.

Consideration

We agree with the OTS conclusions on the changes required to the consideration rules for stamp duty, including: (i) adopting the existing SDRT concept of money or money's worth as a starting point; but importantly (ii) taking the same approach as is used in an SDLT context (see sections 51, 80 and 90 Finance Act 2003) to unascertainable/contingent and unascertained but ascertainable consideration, which would replace the contingency principle and put the wait and see concessionary treatment on a statutory footing.

The contingency principle in particular can give rise to problems in practice and be perceived to be unfair, particularly where the maximum amount of consideration provided for in the transfer agreement is vastly in excess of what would ever realistically be payable or no additional consideration is ever paid. We have had experience, for example, of an anti-embarrassment clause in a draft transfer agreement providing that – if the purchaser of the shares was to on-sell the shares within a particular period of time after completion of the transaction – then the purchaser was to pay over the excess of the consideration it had received on that on-sale as additional consideration for the shares. To ensure that this did not require approval from shareholders, the additional

consideration was proposed to be capped by reference to the class 1 transaction threshold that applied to the purchaser under the UK listing rules (which was greatly in excess of what would ever be paid in practice). The cap was removed in the executed agreement, solely for stamp duty reasons.

It seems to us that the SDLT approach, whereby stamp duty can be paid on the basis of a reasonable estimate, can be deferred if the contingency is not expected to be paid for at least six months, and can be trued up at a later date, provides a good model that would work well for a combined STS.

5. **What would be the benefits and drawbacks of Stamp Duty replicating the territorial scope aspects of the SDRT definition of chargeable securities and/or fully adopting the SDRT definition of chargeable securities? Are there any other options for aligning the scope of Stamp Duty and SDRT and if so what is your reasoning?**

As was set out in the OTS paper of July 2017, the territorial scope of stamp duty gives rise to confusion, complication and additional costs. In our view it is not fit for purpose and ought to be replaced by a straightforward definition which is easy for practitioners and taxpayers to apply and understand.

Concerns with the existing territorial scope of UK stamp duty

We regularly provide advice to clients on the risk of UK stamp duty applying on the transfer of non-UK shares, in which we need to explain antiquated concepts from the Stamp Act 1891 such as “matter or thing done or to be done in the UK”. If there is some UK nexus to the transfer (e.g. if the transferor is incorporated in the UK, or if money is being paid to a UK bank account), the advice to our clients is that there is at least some risk of this very broad test being met.

If the register for the non-UK shares is kept outside of the UK, the main consequence of not paying stamp duty is that the instrument of transfer may not be given in evidence or be available for any purpose (section 14(4) Stamp Act 1891) – noting that SDRT would not apply in these circumstances. That could mean that the transferee is unable to prove their ownership of those shares in the English courts without paying stamp duty, unless the share register provides conclusive evidence of ownership as a matter of local law.

However, the consequences can be even more far-reaching in relation to jurisdictions (such as Luxembourg) where the share purchase agreement itself is typically used as the instrument of transfer (rather than a separate stock transfer form). Where that share purchase agreement is subject to the jurisdiction of the English courts, and the “matter or thing done or to be done in the UK” test is met, then the parties would only be able to enforce their rights under that share purchase agreement (including in relation to a claim under any warranties or indemnities, or for non-performance) if stamp duty was paid on the transfer of the non-UK shares.

For the reasons described above, it is common for separate instruments of transfer to be executed for the transfer of non-UK shares even in circumstances where this is not a local law requirement. If there is a risk that that instrument of transfer may need to be adduced in evidence in UK civil proceedings and therefore stamped in the future, then the parties may conclude that they ought not to execute that instrument of transfer

electronically because that would preclude stamping (or electronic execution may not be permitted as a matter of local law). It is therefore also common for completion of the deal to involve the physical signing of documents, and for that to take place outside of the UK.[2] That means that the signatories to the deal (who can often be senior people within the organisation) are asked to travel offshore, purely for UK stamp duty purposes. The intention would then be for the instrument of transfer to be kept outside of the UK to minimise the risk of penalties arising in the future. That can lead to detailed conversations about how and where those documents may be stored (including whether a custodian for the document ought to be appointed, with the costs that entails). There can be particular complexity where it is intended that documents will be held electronically (particularly where they have been executed electronically) including in terms of restrictions on emailing those documents to people whose emails are held on servers in the UK. All this can be in situations where the shares being transferred are non-UK and there is no nexus with the UK that would justify the imposition of UK stamp duty.

In an internal reorganisation context, valuable non-UK shares will frequently be transferred intra-group (for example, if a particular business division is being transferred to a different part of the group). It will often be difficult to conclude with certainty that the transfer falls outside of the scope of UK stamp duty, as a result of the "matter or thing done or to be done" test, and so the group will be relying on: (i) keeping the relevant instrument of transfer outside of the UK; and (ii) group relief being available if necessary. If the group does apply to the Stamp Office for an adjudication on the group relief position, then it is by no means certain that the Stamp Office will agree even to consider the request; in our experience, these requests can sometimes be returned with a note that it cannot be adjudicated on the basis that stamp duty does not apply to the transfer of non-UK shares. At that point the instrument of transfer may have been brought into the UK to facilitate the group relief application, but no group relief adjudication has been obtained. Many groups will therefore prefer not to submit the application and to hold the documents outside of the UK, but may incur the cost of asking their advisors to prepare a detailed group relief application in case it is required in the future.

Whilst this approach from HMRC may be perceived to be a helpful policy concession, it does not have a legislative basis and therefore would not assist a taxpayer attempting to rely on an unstamped document as part of English legal proceedings.

The costs of identifying these issues, explaining them to our clients (particularly international clients), and then putting the required workarounds in place, can be significant.

Approach to territorial scope

If HMRC agree as a policy matter that UK stamp duty should not apply to the transfer of non-UK shares (at least unless any of the circumstances in section 99(4)(a)-(d) FA 1986 apply), then in our view this should be made clear on the face of the legislation. Whilst this would not make a significant (if any) difference to the amount of stamp duty collected, it would eliminate the considerable time and cost currently spent by

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[2] Some advisors – out of an abundance of caution – advise their clients that not only the completion but also the signing of the deal needs to take place out of the UK.

practitioners and taxpayers on considering and mitigating the UK stamp duty position on the transfer of non-UK shares. It would also remove an element of the UK tax regime that tends to appear antiquated and confusing to international eyes.

We agree with the OTS that using the territorial scope of the definition of "chargeable securities" in section 99 FA would work well. It simply requires taxpayers to ask whether the securities in question are issued by a company incorporated in the UK or alternatively fall within the limited exceptions described by section 99(4) FA 1986. The complexity which results from the existing test in section 14(4) Stamp Act 1891 would fall away, as would the need for the workarounds described above, and we would be left with a simple test that is straightforward to understand and describe to our clients. We would expect that any reduction in the amount of stamp duty collected would be minimal as a result of this change because in practice stamp duty is generally not paid in circumstances where it is not franking an SDRT charge.

Approach to scope of stamp duty more generally

As mentioned above in our response to question 4, we consider that charging stamp duty on materialised shares by reference to chargeable securities would work well.

However, sub-sections 99(5) and 99(5A) FA 1986 will need to be rewritten to exclude specifically the transactions which – under the current regime – would be exempt from all stamp duties. This would need to include: (i) exempt loan capital (per the existing rule in sections 78 and 79 FA 1986); (ii) transfers where the consideration is less than £1,000; (iii) non-marketable debentures. In order to avoid a significant increase in administrative burden on both HMRC and taxpayers, we think it is right that exempt transfers are not made subject to the notification requirements described above. Instead, self-certification should continue to be relied on (including by registrars) in relation to transfers of securities for consideration of less than £1,000 , and reporting should continue not be required for other exempt transfers.

The OTS highlights three transfers which are currently within the scope of stamp duty but which fall outside of the scope of SDRT, being (i) the grant of certain options (following the rule in the *George Wimpey* case[3])[4]; (ii) the transfer of partnership interests where those partnerships hold stock or marketable securities (paragraphs 31-33 Schedule 15 Finance Act 2003); and (iii) the transfer of land which is subject to old resting on contract planning (section 125(5) Finance Act 2003).

Per the OTS report, very little stamp duty is currently paid on the grant of options or on the transfer of partnership interests. If the grant of options and transfer of partnership interests remained within the scope of an assessable stamp duty then this could lead to a significant increase in the amount of stamp duty collected on these transactions. It did not seem to us to be right for a modernisation programme to result in what would be (in effect) an extension of the tax base and therefore our preference (for simplicity and to maintain the status quo) would be for the grant of options and the transfer of

[3] *George Wimpey & Co Ltd v IRC* [1975] 2 All ER 45

[4] We note that there seems to be some confusion around the test for whether the grant of an option is stampable.

partnership interests to be excluded from scope of the combined STS regime.[5] If the policy decision was taken to make these transactions subject to stamp duty, then the territorial scope would need to be properly addressed.

The approach in the combined regime to old land transactions which are resting on contract would need to be determined as a policy matter.

6. How would you like the Stamp Duty notification framework to operate? In particular, should there be a greater element of self-assessment?

See our answer to question 4 above.

7. Is it now redundant for the Stamp Duty to be tied to registration of title of shares? Do you think that registrars' obligations in respect of Stamp Duty should be amended and, if so, in what way?

See our answer to question 4 above.

8. What would be the benefits and drawbacks of making changes to the notification framework before Stamp Duty is digitised (see also section 8 below)?

See our answer to question 3 above.

9. Can you think of improvements other than digitisation that can be made to the current process for collecting Stamp Duty and SDRT?

See our answer to question 4 above.

10. What are your views on the desirability of having the company reliefs applicable to SDRT as well as Stamp Duty? What other Stamp Duty reliefs should also be applicable to SDRT?

See our answer to question 4 above.

11. What is your experience of dealing with "residual securities"? Would you normally expect these securities to be settled by the completion of a STF?

Yes generally "residual securities" which cannot be settled through CREST are transferred by way of a stock transfer form, or using the declaration of trust method mentioned above.

12. What has been your experience of the COVID-19 temporary changes to the processing of STFs and other instruments of transfer? Which elements of the temporary processes do you think HMRC should retain?

Our experience has generally been a positive one, in particular the move away from a physical stamping process and the acceptance of electronically signed documents has been welcome. Perhaps as a result of the particular circumstances, we have noticed

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[5] It would be helpful if the treatment of partnership interests under the STS regime was expressly addressed in the legislation because, notwithstanding HMRC's statements in STSM091040 (which would tend to suggest that HMRC's view is that no SDRT would be due on the transfer of a partnership interest where that partnership holds UK shares), there seems to remain some confusion in the market on the point.

a longer backlog than usual. There have also been occasions where emails have been lost and have needed to be sent multiple times.

See our response to question 3 above for the elements that we think ought to be retained.

13. Is there anything you would particularly like to see or not see in a redesign of payments and enforcement for STS?

See our answer to question 4 above.

14. Do you think the current Stamp Duty payment and enforcement framework is appropriate? If not, what do you think would be appropriate?

See our answer to question 4 above.

15. Should any of the Stamp Duty and SDRT processes in relation to payments and enforcement be aligned? If so, what would be the most effective means of aligning these processes (e.g. charging point, notification, payment, repayment, appeals etc.)?

See our answer to question 4 above.

16. Registration of share title is currently conditional on having the relevant instrument appropriately stamped for Stamp Duty. Is this current conditionality effective as a means of incentivising compliance? If so, is it the most effective means of achieving that? If the answer to either question is “no”, then what would be more effective?

See our answer to question 4 above.

17. Has the fact that HMRC is only able to accept payments and make repayments for Stamp Duty and SDRT electronically rather than by cheque while the temporary processes are in place caused any issues for you or your clients?

This has not been a concern for our clients, who generally arrange for payment to take place electronically in any case.

18. What are your views on the digitisation of Stamp Duty? Do you think that this is vital for the modernisation of the tax? Do you have any views as to the best method of achieving this?

See our answer to question 4 above.

19. How would you or your clients envisage holding and transferring shares in future?

See our answers to questions 24 and 25 below.

20. In your view, is the STF a necessity? Could you and your clients do without a STF? What other documents could be used, for example, an agreement to transfer?

In our view, whilst a stock transfer form may not be a necessity we think it is very helpful in practice for there to be a document which is executed on the completion of the

transfer of materialised shares, which describes the shares being transferred and the consideration being provided. This is helpful for the purposes of company registrars (and as mentioned above we are in favour of company registrars maintaining their role in the stamp process). If we move towards a "substantially completed" test to identify the charging point for the tax then a stock transfer form would be helpful in terms of evidencing this.

21. Would an electronic STF be beneficial?

Yes, this would allow for greater flexibility and so would be welcomed.

22. Would it be beneficial for HMRC to continue to allow the use of electronic signatures after the COVID-19 measures have ended?

Yes, we are in favour of the continued use of electronic signatures on stock transfer forms. We are increasingly seeing documents being executed electronically in the context of transactions and it is sometimes only the stock transfer form that is required to have a "wet ink" signature (solely for stamp duty reasons). Flexibility on this point would reduce the logistical issues that can arise as a result.

23. Are there any additional electronic processes which you and/or your clients would like to see after the COVID-19 measures have ended?

See our answer to question 3 above.

24. Do you or your clients envisage using distributed ledger technology to hold records of ownership?

We are aware of this technology being considered in this context and we think it would be helpful for the legislation to be future-proofed as much as possible so that it can be adapted easily as legal technology develops.

25. Do you or your clients envisage making use of smart contracts?

We are aware of clients considering this technology in this context and think it would be helpful for the legislation to be future-proofed as much as possible so that it can be adapted easily as legal technology develops.

26. What terms and business practices are not adequately covered in current Stamp Duty and SDRT legislation?

We regularly come across difficulties in practice in dealing with the SDRT treatment of depositary interests (***DIs***) representing non-UK shares.

Where a non-UK incorporated company wishes for its shares to be admitted to trading on the LSE or AIM (or where a company's shares are listed on a foreign stock exchange and the company would also like maintain a listing on the LSE or AIM), in many cases the company must put a DI structure in place to facilitate its shares being held in CREST and admitted to trading on the LSE/AIM. This will typically involve a third-party company (e.g. Computershare UK PLC) holding the shares on trust (as bare trustee) and issuing DIs representing those shares through CREST to the shareholders pursuant to a DI Deed (if the third-party company is a Euroclear subsidiary, then the DIs are usually referred to as CREST Depositary Interests, or CDIs).

The shares in a non-UK incorporated company would not normally be chargeable securities (section 99(4) FA 1986), so before the DI structure is put in place agreements to transfer the shares would be outside the scope of SDRT. However, the approach in the stamp taxes legislation is generally to regard the DI as a security in its own right and, given that the DI is typically issued by a UK company, the DI *would* be a chargeable security for SDRT purposes. That means that it is necessary to rely on an exemption from SDRT in respect of agreements to transfer the DIs.

Complications can arise where DIs represent shares in a non-UK incorporated company that are listed and admitted to trading on a recognised stock exchange. In that case, one would normally expect to rely on the exemption from SDRT for DIs over foreign securities set out at paragraph 3 of the Stamp Duty Reserve Tax (UK Depositary Interests in Foreign Securities) Regulations 1999. However, that exemption is not available where the underlying shares are in a company that is (although non-UK incorporated) centrally managed and controlled in the UK (see the definition of "foreign securities" in paragraph 2 of those Regulations). This is an odd result, given that, before the DI structure is put in place, the underlying shares themselves would be outside the scope of SDRT, so it seems surprising that the agreements to transfer the DIs would be within the scope of SDRT (from the shareholder's perspective, all that has changed is that their shares have been put inside a DI wrapper). In some cases, workarounds have been found to deal with this in practice (involving bespoke clearances from HMRC), but that seems unnecessarily time consuming and we consider that it would be preferable for this seeming anomaly to be corrected in the Regulations.

A further complication that we have recently seen in practice arises where the DIs represent shares admitted to trading on AIM. There is an exemption from SDRT for *shares* admitted to trading on a recognised growth market and not listed on that or any other market (pursuant to section 99(4B) FA 1986). However, on the face of the legislation, that exemption does not appear to be available in respect of agreements to transfer the DIs, rather it is only available in respect of agreements to transfer the share themselves (the *DIs* are not admitted to trading on AIM). However, HMRC's guidance indicates that in practice HMRC do take the view that the growth market exemption is available in respect of agreements to transfer DIs. At STSM041280, HMRC say:

> "*A DI/CDI will be eligible for the growth market exemption upon its transfer, if the underlying security (or the DI/CDI that represents that underlying security) is admitted to trading on a recognised growth market and not listed on a recognised stock exchange.*"

This is helpful, but it does mean that it is difficult for a law firm to give an opinion that the SDRT exemption is available without reference to the underlying guidance. That is problematic, because Euroclear (the operator of CREST) requires an opinion, based on law alone, that the SDRT exemption is available. This causes a tension that can take some time to resolve.

It seems to us that the above points could be simply addressed by changing the legislation so that it is clear that there will be no SDRT on an agreement to transfer a DI if that DI represents an underlying security the transfer of which would be outside the scope of SDRT.

Finally, another (albeit smaller) point that can arise when legal opinions are required to be given, such as opinions required by banks in respect of equity capital markets transactions, relates to section 117 Stamp Act 1891. Typically, these opinions include an opinion as to the enforceability of the relevant contracts (e.g. underwriting agreements). Those contracts will often include an indemnity in relation to stamp taxes (on the basis that banks will want to ensure they are not exposed to stamp duty from their role underwriting or otherwise facilitating a transaction). However, section 117 casts doubt on the enforceability of stamp duty indemnities, resulting in opinions having to be caveated. We are not aware of section 117 ever being invoked in practice – or a policy reason why it should be. Removing this provision would remove an unnecessary complication in respect of such opinions.

There are various other smaller technical flaws in the current legislation which we have not covered in this letter but which are sometimes dealt with by the issuing of helpful specific HMRC clearances. We would propose to provide HMRC with a list of these points in due course as the consultation process develops.

27. Do you have any further comments or thoughts on the current STS regimes and modernisation of Stamp Duty? To what extent have the COVID-19 temporary changes impacted your thinking?

It is unsatisfactory, in our view, that the 1.5% stamp duty / SDRT charges have remained on the statute book unamended notwithstanding the *Vidacos*[6], *HSBC*[7] and *Air Berlin*[8] decisions. The nearing end of the Brexit transitional period brings this point into sharper focus. It is helpful that the government has set out clearly that will not bring back the 1.5% charges[9] but it would be welcomed if the legislation could be repealed and/or amended to reflect that position.

Relatedly, we would request that the election regime under section 97A Finance Act 1986 is reformed so that HMRC are required to publish the terms of those elections in full. A taxpayer transferring securities to a clearance system (in circumstances where the above decisions do not apply to remove the 1.5% charge) currently has no independent means of determining when the securities will be subject to the 1.5% "season ticket regime" or the alternative system of charge. Publishing the terms of those elections would assist with this.

To the extent that it remains HMRC's practice to deem overseas clearance systems to have made a section 97A election in relation to UK shares held on an overseas branch register, in order to avoid such shares trading subject to both UK and overseas stamp duty, we would request that such practice be put on a statutory footing.

Finally, we would welcome a policy decision on the applicability of the 1.5% charge in the context of a dividend demerger. Generally, a dividend demerger is free of stamp duty. However, if an existing ADR programme needs to be replicated for the demerging

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[6] *HSBC Holdings PLC and Vidacos Nominee Ltd v Commissioners for HM Revenue & Customs* C-569/07.

[7] *HSBC Holdings plc and the Bank of New York Mellon Corporation v HMRC* TC/2009/16584

[8] *Air Berlin plc v RCC* [2017] All ER (D) 104

[9] Autumn 2017 Budget Report, paragraph 3.39

company then this currently results in a 1.5% charge on transferring the shares to the depositary. This charge does not arise if the transaction is structured as a three-cornered demerger (because this would involve new shares being issued to the depositary, which should not be subject to the charge as a result of the decisions mentioned above). We are not aware of a policy rationale for distinguishing between the two structures and we would therefore suggest that the 1.5% charge be disapplied in the context of a dividend demerger.

POINTS OF CONTACT

We welcome this call for evidence. It is encouraging that HMRC are exploring options for the fundamental redesign of the STS regimes, and we hope that this process will result in a modern, effective stamp tax regime which works much more efficiently both for HMRC and for taxpayers. We look forward to engaging with HMRC further on this process in due course as part of a continuing dialogue on these issues.

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

Philip Harle
Chair City of London Law Society Revenue Law Committee

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