

## Minutes of WG2 Meeting

Wednesday 14 January 2015

HMRC, Right Auditorium, 1 Horse Guards Road, London, SW1A 2HQ

### Attendees

Paul Baldwin (FTI Consulting)  
Adam Blakemore (Cadwalader)  
Ann Brennan (GE / BBA Rep)  
Ashley Greenback (Macfarlanes)  
Andrew Hastie (LBG)  
Kathryn Hiddleston (Grant Thornton)  
Graham Iversen (BVCA/  
Greenberg Traurig Maher)  
Tim Lowe (Linklaters)  
Vincent Maguire (Clifford Chance)  
David Porter (BDO)  
Jonathan Richards (Ernst & Young)  
Andrew Seagren (KPMG)  
Gareth Thomas (Deloitte)  
Graham Williams (PWC)

(collectively the 'group')

Tony Sadler (HMRC) - **Chairman**  
Roger Bath (HMRC)  
Judith Diamond (HMRC)  
James Duncan (HMRC)  
Mark Lafone (HMRC)  
Chris Murrice (HMRC)  
Liz Ward-Penny (HMRC)

(collectively 'HMRC')

### Apologies

David Boneham (CIOT/Deloitte)  
Nikol Davies (Taylor Wessing)  
Bill Grierson (RBS)  
Catherine Linsey (ECI Partners)  
Lara Okukenu (Deloitte)

### Introductions and background

The main purpose of the meeting was to discuss issues relating to the proposed corporate rescue exemption, in particular the application of new section 323A. A link to the draft guidance on the corporate rescue exemption on the GOV.UK website had been circulated to working group members on 12 January 2015.

In addition, HMRC welcomed comments on any points arising from the publication of the draft legislation in December 2014, following Autumn Statement. The closing date for comments on the draft legislation is 4 February 2015.

#### 1. Partnerships

Chris Murrice would now be leading on this strand of work for HMRC. HMRC suggested that it might be sensible to form a sub-group to continue with the partnership strand, reporting back as necessary.

Members who expressed an interest in being involved in the partnership sub-group were:

Graham Iversen, Alex Jupp, Tim Lowe, David Boneham, Andrew Hastie and Catherine Linsey.

Anyone else who would like to be involved in discussions in developing this strand of work were invited to put their names forward.

#### 2. New s323A CTA 2009

New S322(5B) and s323A CTA 2009 remove the obligation to bring into account a loan relationship credit arising on a release, modification or replacement of debt in certain circumstances when a company is unable to pay its debts.

The group raised the following points in relation to the second exemption for substantial modifications and its interaction with the FRS 102 and the Change of Accounting Practice ('COAP') Regulations:

**(a) What is the correct accounting treatment and does the entire credit fall within the exemption?**

Members of the group queried whether the difference in wording between section 323A and the COAP Regulations meant that a different approach should be followed. The example was given of a debt of £100 with a carrying value of £95 which is subject to a substantial modification resulting in it being derecognised and re-recognised, at which point credit worthiness is taken into account. If the deduction for creditworthiness is £30, the total exempted credit would be £35 under s323A, but would the exemption under the COAP Regulations be only £5?

There was some discussion concerning the point at which a credit on transition would be recognised in relation to a deterioration in credit-worthiness of the debtor.

There was also discussion of the circumstances in which amounts would be recognised in respect of a 'qualitative' change as well as quantitative changes, for example a change in membership of a syndicate. It was recognised that there was currently no consistency of accountancy views on this.

It was considered that the entire credit would be exempt, whether section 323A or the COAP Regulations were in point. However, HMRC would consider the point further.

**(b) Is the 12 month time limit sufficient?**

Good insolvency practice often involves taking action approximately 15 months before maturity of the debt. Members asked if this would rule out the application of s323A?

HMRC's view was that this should not be incompatible with 12 month limit. The provision was aimed to apply in cases of companies in genuine distress where there was a reasonable likelihood of a company becoming insolvent if it did not do something about its debt, for example the 'amend and extend' exercise. By contrast, the provision should not be applied to companies not at imminent risk of failure.

It was noted that there could be cases where at the 15 months point it might be reasonably clear that a company would be unable to repay the principal, but could still meet the interest payments falling due within the following 12 months. However, the key point was the date of the release or substantial modification, and in practice unless this took place very close to the company's accounting date this was unlikely to be a particular problem.

### **3. Draft Guidance**

The final version of the guidance would be included in the Corporate Finance Manual. HMRC had tried to incorporate comments made on earlier versions of the draft guidance, and expected it to be applicable to the majority of cases.

The group queried the observation made in the draft guidance that an insolvent balance sheet would be the 'strongest' evidence of a company in financial difficulty, and whether this was consistent with other comments drawn from insolvency case law. In many cases it was felt that breach of financial covenants may be stronger evidence

The group also queried the omission of comments in previous versions of the draft guidance indicating the applicability of the exemption to releases in arm's length situations, and suggested similar wording in the guidance on section 323A. HMRC undertook to review the editing of the previous version of the guidance.

The group queried the use of different wording such as 'realistic', 'significant' and 'material' in different parts of the guidance and asked if this indicated a tougher approach than the raft legislation. HMRC said that a key aim of the guidance was to explain where HMRC saw the boundary between cases of real financial distress and normal debt management exercises. Too much should not be read into differences in wording.

HMRC would review the current draft guidance and would welcome further suggestions for improvements.

#### **4. Interaction with s358**

The group discussed what would happen in the case of distressed debt sold back to an insolvent group, where the borrower and lender subsequently agree to release the debt and the release of relevant rights is brought in under s361 CTA 2009. HMRC confirmed that it was envisaged that the provision would work in the same way as the current interaction between section 322(4) CTA 2009 and section 358 in the case of debt/equity swaps. No taxable credit would arise on the release of relevant rights where the conditions for sections 322(5B) and 323A were satisfied.

#### **5. Next Steps and meeting**

The closing date for comments on the draft legislation is 4 February 2015.

HMRC explained that its current assumption was that the draft legislation would be included in the pre-election Finance Bill, subject to Ministers' decisions, and that the commencement date for the corporate rescue exemptions would be 1 January 2015.

HMRC confirmed that there would be an opportunity to consider issues discussed in previous meetings but not included in the draft FB 15 legislation for FB 15, such as sections 361/362, and subject to Minister's decisions, the possibility of further legislative changes in FB 16.

The date of the next meeting is on 16 February 2015, 10:00-12:00, 1 Horse Guards Road.