GAAR ADVISORY PANEL

Redacted and sub-panel approved version of the Opinion Notice issued on 28 February 2018

Subject Matter

Employee Obligation to Employer Financed Retirement Benefit scheme arising through the use of arrangements including a deed of contribution, employee loan agreement and tripartite agreement. Reward by way of what the sub-panel considered to be (in substance) loan to employee.

Taxes

Income tax and corporation tax

Relevant Tax Provisions

ITEPA 2003 especially Part 7A and CTA 2009 Part 20 Chapter 1 (especially section 1290).

Opinion

The entering into of the tax arrangements is not a reasonable course of action in relation to the relevant tax provisions; and the carrying out of the tax arrangements is not a reasonable course of action in relation to the relevant tax provisions.

Opinion Notice:
This opinion notice is given pursuant to paragraph 11 of Schedule 43 to the Finance Act 2013 by a sub-panel consisting of three members of the GAAR Advisory Panel (the "Panel") in the referral by HMRC dated 11 December 2017 relating to the taxpayer BCD Ltd.

The sub-panel received written material from HMRC under paragraph 7 Schedule 43 FA 2013.

1. ***Reminder of what the sub-Panel's opinion notice is to cover***

"An opinion notice is a notice which states that in the opinion of the members of the sub-panel, or one or more of those members—

> *(a) the entering into and carrying out of the tax arrangements is a reasonable course of action in relation to the relevant tax provisions—*
>
> > *(i) having regard to all the circumstances (including the matters mentioned in subsections (2)(a) to (c) and (3) of section 207), and*
> >
> > *(ii) taking account of subsections (4) to (6) of that section, or*
>
> *(b) the entering into or carrying out of the tax arrangements is not a reasonable course of action in relation to the relevant tax provisions having regard to those circumstances and taking account of those subsections, or*
>
> *(c) it is not possible, on the information available, to reach a view on that matter,*

and the reasons for that opinion." (para 11(3) Sch 43 FA 2013)

"For the purposes of the giving of an opinion under this paragraph, the arrangements are to be assumed to be tax arrangements." (para 11(4) Sch 43 FA 2013)

2. ***Terms used in this opinion and parties to the arrangements***
   2.1. This case relates to taxpayer BCD Ltd. Mr J and Mr K are both shareholders in, and directors of, BCD Ltd.
   2.2. In addition to Mr J and Mr K this case also relates to an employer financed retirement benefit scheme established for BCD Ltd ("the EFRB").
   2.3. By "Trustee" we mean the legal entity that is trustee of the EFRB.
   2.4. Precise figures, including the quantum of fees and expenses, are not important in this opinion so we use a simple "about £120,000" to cover amounts referable to Mr J's allocation, "about £100,000" to Mr K's allocation, and "about £220,000" to the aggregate amount allocated.
   2.5. In this opinion when we refer to "Guidance" we mean the GAAR Guidance approved by the Panel with effect from 15 April 2013, and statutory references without a statute are to ITEPA 2003.
   2.6. The arrangements in this case took place before NICs were covered by the GAAR.

3. ***Outline of the arrangements***
   3.1. BCD Ltd adopted the arrangements as an incentivization and reward arrangement for its key employees.
   3.2. On 8 July 2013 the EFRB is established with an initial £100 contribution from BCD Ltd.
   3.3. On 8 July 2013 an Initial Sub Fund and a Conventional Sub Fund are created within the EFRB and £5 is appointed to each.
   3.4. On 8 July 2013 BCD Ltd signs two deeds of covenant that provide for a series of several BCD Ltd covenants relating to accounting periods 2013 to 2022. Each deed of covenant provides for BCD Ltd to make a payment to the EFRB trustee in respect of the relevant accounting period of an unspecified percentage of up to 100 per cent of the estimated profits for that accounting period. As far as we can see, even at the time estimated profits for a relevant accounting period are determined, the amount of the payment is not capable of being calculated under the terms of the deeds of covenant. The trustee is to hold each payment it receives on trust for the Initial Sub Fund and Conventional Sub Fund in the ratio 0.5:99.5 (the "Sub Fund Trusts").
   3.5. On 8 July 2013 BCD Ltd and Trustee sign a deed of agreement with each of Mr J and Mr K. Each agreement provides that:

      a) BCD Ltd makes an interest free loan repayable on demand to Mr J and Mr K respectively shortly before the end of each of the accounting periods 2013 to 2022. The loan amount for the relevant accounting period is an unspecified percentage of up to 100 per cent of the estimated profits for that accounting period. As far as we can see, even at the time estimated profits for a relevant accounting period are determined, the amount of the loan is not capable of being calculated under the terms of the deeds of agreement;
      b) BCD Ltd enters into future deeds of covenant under which it covenants to pay an amount equal to each loan once made to the Trustee, the Trustee to hold the benefit of the covenant for BCD Ltd;
      c) BCD Ltd assigns to the EFRB trustee its beneficial interest in the future deeds of covenant, the benefit to be held on the Sub Fund Trusts;
      d) BCD Ltd, Trustee and Mr J and Mr K respectively, and for each accounting period, enter into future tripartite deeds the future result of those deeds is intended to be that Mr J and Mr K incur obligations to the EFRB trustee equivalent to their obligations under the loans at a), Mr J's and Mr K's loans at a) are treated as repaid, and BCD Ltd's obligations under b) are released.

3.6. On 30 September 2013 BCD Ltd enters into a loan agreement with Mr J under which it agrees to advance about £120,000. The loan is in part drawn down on 1 October 2013, the balance relating primarily to an amount already owing on Mr J's company loan account. The loan is interest free and repayable on demand.

3.7. On 30 September 2013 BCD Ltd enters into a loan agreement with Mr K under which it agrees to advance about £100,000. The loan is drawn down on 1 October 2013. The loan is interest free and repayable on demand.

3.8. On 11 November 2013 BCD Ltd enters into two deeds of covenant under one of which BCD Ltd covenants to pay about £120,000 and under the other about £100,000 to Trustee, to be held on trust for BCD Ltd.

3.9. On 12 November 2013 the benefit of the two 11 November covenants is contributed by BCD Ltd to Trustee as trustee of the Sub Fund Trusts.

3.10. On 22 January 2014 two tripartite deeds are entered under which:

a) Mr J's obligation to pay about £120,000 to BCD Ltd under his loan agreement is treated as having been satisfied in full;
b) Mr J undertakes an equivalent obligation to the EFRB trustee;
c) Mr K's obligation to pay about £100,000 to BCD Ltd under his loan agreement is treated as having been satisfied in full;
d) Mr K undertakes an equivalent obligation to the EFRB trustee;
e) the EFRB trustee holds the debt claims for the Sub Fund Trusts; and
f) BCD Ltd is released from its obligation to pay about £220,000 under the two 11 November deeds of covenant.

3.11. HMRC considers the debts owed to the EFRB by Mr J and Mr K are unlikely to be paid. We reach our conclusion without having to take a view on, and without being influenced by, how likely Mr J and Mr K are to repay these debts.

4. Tax Arrangements and section 215 FA 2013

4.1. Section 215 (1) FA 2013 provides: "*The general anti-abuse rule has effect in relation to any tax arrangements entered into on or after [17th July 2013].*"

4.2. Subsections 215 (2) and (3) FA 2013 provide:

" (2) Where the tax arrangements form part of any other arrangements entered into before [17th July 2013] those other arrangements are to be ignored for the purposes of section 207(3), subject to subsection (3).

(3) Account is to be taken of those other arrangements for the purposes of section 207(3) if, as a result, the tax arrangements would not be abusive."

4.3. Paragraph C10.5 of the Guidance states: "*Specific provisions in s212 FB 2013 deal with the case where there is a 'larger' arrangement which started before [17th July 2013], but within that larger arrangement there are transactions which were entered into after that date and which HMRC consider to be an abusive arrangement when viewed in isolation.*"

4.4. Paragraph C10.6 of the Guidance states: *"In such a case, no account may be taken of the wider arrangement in determining the position in regard to the narrower arrangement, subject to a safeguard in favour of the taxpayer. The safeguard is that account is to be taken of the wider arrangement if doing so would show that the narrower arrangement was not abusive."*

4.5. HMRC's position: HMRC acknowledges the "tax arrangements" are part of wider arrangements, some of which occurred before 17th July 2013 (the "commencement date"). However HMRC maintains that it does not need to take into account pre-commencement date transactions to show the tax arrangements here to be abusive. Further HMRC maintains that the pre-commencement date transactions do not indicate that the tax arrangements are not abusive.

4.6. Taxpayer's position: the two deeds of covenant and two deeds of agreement were signed on 8th July 2013, before the commencement date. As the subsequent documents implemented the pre-commencement date arrangements, those subsequent documents should, by virtue of section 215(2) FA 2013, be ignored. The taxpayer's position together with a copy of signed 8th July 2013 documents was sent (out of time) to HMRC and included by HMRC in its reference material to the Panel. Having received that material from HMRC, we have considered the material in the same way we would have done had it been a timely representation under paragraph 4 Schedule 43 FA 2013.

4.7. We have found Example D38 of the Guidance helpful. That Example illustrates the application of section 215 FA 2013 to a situation in which pre-commencement date steps are preparatory to the post-commencement date abusive transaction.

4.8. We set out below the relevant transactions making up the tax arrangements in HMRC's paragraph 3 Schedule 43 FA 2013 notice, we have added the dates the documents were signed:

a) Creation of loans to Mr J and Mr K (30 September 2013)
b) Creation of debt obligations in favour of BCD Ltd under deeds of covenant (11 November 2013)
c) Contribution of benefit of debt obligations under b) to EFRB (12 November 2013)
d) Entry into of tripartite deeds (22 January 2014).

4.9. In coming to our opinion we have therefore focused on the post-commencement date transactions as set out in 4.8 above.

4.10. In our view the post-commencement date transactions are capable of being abusive arrangements on a standalone basis. We agree with HMRC's implicit position that the pre-commencement steps are either preparatory in nature (eg the establishment of the EFRB and the creation of the Sub Funds (see 3.2 and 3.3 above)) or can be ignored entirely (the 8th July 2013 deeds of covenant and deeds of agreement (see 3.4 and 3.5 above)).

4.11. In looking at the wider arrangements including the pre-commencement date arrangements, we conclude that section 215 (3) FA 2013 is of no assistance to the taxpayer; it is not the case that the tax arrangements would not be abusive when taking the pre-commencement date arrangements into account.

5. *GAAR Advisory Panel Opinion of 26th January 2018 (Earlier Similar Case)*

5.1 The arrangements entered into by the taxpayer in this case are similar to the arrangements entered into by the taxpayer in the Employee obligation to Employment Financed Retirement Benefit scheme arising through use of multiple tripartite arrangements case on which a sub-panel of the Panel opined on 26th January 2018 (the "Earlier Similar Case"). The opinion relating to the Earlier Similar Case, is published under the heading "GAAR Advisory Panel opinion - employee rewards using multiple tripartite arrangements" on the GOV.uk website.

5.2 We come to the same conclusion in this case as the sub-panel did in the Earlier Similar Case, and do so for similar reasons.

6. *Summary of substantive result of the arrangements*

6.1. As a result of the arrangements:

a) about £120,000 is available to Mr J and about £100,000 to Mr K for their use;
b) BCD Ltd's resources are reduced by about £220,000; and
c) there are on-going contractual arrangements between the EFRB trustee and Mr J, and between the EFRB trustee and Mr K, under which Mr J owes about £120,000 to the EFRB and Mr K owes about £100,000 to the EFRB.

7. ***The tax advantage***

7.1. HMRC's position is BCD Ltd seeks to avoid a charge to income tax (and the associated PAYE charge) on the funds made available to Mr J and Mr K.

7.2. In particular it is HMRC's position that BCD Ltd seeks to avoid a section 62 remuneration charge (and the associated PAYE charge), and a Part 7A disguised remuneration charge (and the associated PAYE charge).

7.3. It is also HMRC's position that the scheme of the legislation for deductions for remuneration and for employee rewards and benefits only allows a deduction to the extent, and at the time, a corresponding benefit is charged to income tax.

8. ***Tax results argued for by the taxpayer***

8.1. BCD Ltd has put forward no argument beyond the argument that the arrangements are covered by section 215(2) FA 2013 so the GAAR legislation does not apply (see 4 above), in particular BCD Ltd has provided no representations to us under paragraph 9 schedule 43 FA 2013.

8.2. We set out below, from HMRC's paragraph 3 Schedule 43 FA 2013 notice to BCD Ltd, HMRC's understanding of BCD Ltd's arguments. We note that these arguments are consistent with those put forward by the taxpayer in the Earlier Similar Case.

8.3. On section 62: *"You consider that section 62 does not apply in respect of these arrangements in such a way as to bring any liability to tax, other than with respect to any loan interest charge under the benefits code. I take it that this is because you consider the fact that there is an obligation on the employees to pay the sum to the trust to mean that the employees have not earned anything meaning that section 62 cannot apply."*

8.4. On Part 7A:*"The [promoter's tax strategy letter] states: "Counsel confirms the above strategy does not involve any contravention of the provisions of part 7A ITEPA 2003 as per the Finance Act (No.3) 2011." I understand that to be because there is no relevant step taken by a relevant third party. Although [the EFRB trustee], acting as trustee, would be a relevant third party, it does not directly provide any reward, recognition or loan to the employee".*

8.5. On corporation tax deductibility: *"My understanding is that you consider there is no requirement that the charge to Income Tax must be on an amount equal to the amount of the deduction sought. I understand that you consider that appointing a very small percentage of each contribution to the Initial Sub Fund in such a way that an Income Tax charge arises on that amount is sufficient to enable you to claim a deduction for the full amount, including the amount appointed to the Conventional Sub Fund."*

9. ***What are the principles of the relevant legislation and its policy objectives?***

9.1. The overall scheme of taxation for sums derived from employment is a patchwork including:

a) income tax on "money's worth" earnings under section 62:
b) income tax on the sum of money (or value of the asset) made available under the disguised remuneration rules in Part 7A;
c) a charge to tax on beneficial loans made by the employer; and
d) in the case of a loan or advance by a close company to a participator, a tax charge on the company on the amount of the loan or advance "as if it were an amount of corporation tax".

9.2. In this opinion we are concerned, against this legislative patchwork background, with Part 7A in particular.

9.3. The 9th December 2010 Ministerial Statement sets out the thinking behind Part 7A. *"The legislation [Part 7A introduced by FA 2011] ensures that where a third party makes provision for what is* ***in substance*** *a reward or recognition, or* ***a loan****, in connection with the employee's current, former or future employment, an income tax charge arises. Income tax is charged on the sum of money made available and on the higher of the cost or market value where an asset is used to deliver the reward or recognition … The amount concerned will count as a payment of employment income and the employer will be required to account for PAYE".* (emphasis added)

9.4. Part 7A was introduced as a wide-ranging anti-avoidance measure to tackle arrangements used for the purposes of disguising remuneration to avoid, reduce or defer income tax. Part 7A does not require the chargeable benefit to be an unconditional benefit. For example, the principal amount of a loan made available by an employee trust (including by an EFRB) is chargeable even though, being a loan, there is a requirement for the principal of the debt to be repaid.

9.5. Where, for example, trustees of an EFRB, or other employee trust, make a loan to an employee on wholly commercial terms, the employee is charged to income tax as if they had been given the money out-and-out. If and when the loan is repaid, even if on the next day, no relief is given for the income tax paid.

9.6. As Part 7A operates in this way and imposes a charge to tax on "non-existent" income, Part 7A is viewed by some taxpayers and their advisers as arbitrary, unjust and capricious.

9.7. The Guidance sheds light on how this perceived unfairness should be resolved.

Paragraph D2.7.1 states: "The GAAR is intended to bring to an end, so far as possible, the game of legislative catch-up and to make sure that "keep off the grass" warnings are heeded. If, therefore, a TAAR has been introduced with a clear purpose of preventing a particular type of behaviour but a taxpayer enters into arrangements that are intended to exploit a loophole or shortcoming in the TAAR and obtain a benefit that is clearly unintended, the GAAR will apply."

And Paragraph D2.7.2 continues: *"… examples [of D2.7.1 situations] include … devising contrived ways of circumventing the disguised remuneration rules or enabling employees to obtain pension rights above the statutory limits."*

Paragraph B11.1 states: *"It is recognised that under the UK's detailed tax rules taxpayers frequently have a choice as to the way in which transactions can be carried out, and that differing tax results arise depending on the choice that is made. The GAAR does not challenge such choices unless they are considered abusive. As a result in broad terms the GAAR only comes into operation when the course of action taken by the taxpayer aims to achieve a favourable tax result that Parliament did not anticipate when it introduced the tax rules in question and, critically, where that course of action cannot reasonably be regarded as reasonable."*

Paragraph B12.2 states: *"… safeguards (and particularly the 'double reasonableness' test) would prevent the GAAR operating in relation to arrangements entered into for the purpose of avoiding an inappropriate tax charge that would otherwise have been triggered by a more straightforward transaction. Tax charges of this sort (sometimes referred to as 'bear traps') can be encountered from time to time. For example where a taxpayer has to take what appear to be contrived steps in order to ensure that they are not taxed on more than the economic gain, such an arrangement would not generally be regarded as abusive."*

9.8. Where Guidance indicates that contrived steps taken to ensure the taxpayer is not taxed on more than the economic gain would not "generally" be regarded as abusive, it is recognising there can be exceptions to the "general" case. An exception arises where Parliament clearly intends to discourage "a particular type of behaviour" by imposing a tax charge on an amount in excess of the economic gain.

9.9. There is no economic difference between the arrangements in this case and a loan made to the employees by an employer funded EFRB; in substance there is a loan made to the employees by an EFRB. This is not a case of the legislative framework providing a taxpayer with a taxable/non-taxable choice.

9.10. Where an employer makes a direct loan there is no corporation tax deduction and an employee benefits charge arises to the extent interest is charged at a rate lower than the official rate. In addition, where the relationship between employer and employee is one of close company and participator, the loan to participator charge may also be relevant.

9.11. Part 7A when introduced in 2011 was headed “Employment income provided through third parties”. The principle underlying Part 7A is that a taxpayer should not be able to avoid a charge to tax on employment income by entering into arrangements with a third party that make provision for what is in substance an employment related reward (including a reward by way of loan). Paragraphs D2.7.1 and D2.7.2 of the Guidance make it quite clear the GAAR is designed to put a stop to the game of legislative catch-up where, for example, taxpayers have sought to devise contrived ways of avoiding the disguised remuneration rules.

9.12. The policy and intent behind the legislation charging tax on employee benefits and the charge under Part 7A are clear; a final tax charge is imposed on what is received, rather than on the apparent economic benefit, which may well be lower.

9.13. A tax charge intended by Parliament cannot in the context of the GAAR be said to be “inappropriate” and therefore cannot create a “bear trap” that it is reasonable to avoid by adopting contrived steps.

9.14. The overall scheme for corporation tax deductions on rewards to employees (including rewards by way of loan) is to align the timing of the employer’s deduction with the point at which the employee suffers tax (see Chapter 1 of Part 20 CTA 2009 (Restriction on Deductions – *Unpaid remuneration and Employee benefit contributions*)).

10. *Does what was done involve contrived or abnormal steps (section 207(2)(b) FA 2013)?*

10.1. It is not abnormal for an employer to make use of an EFRB. The scheme of legislation for employee benefits recognizes employers have a choice as to whether to reward employees (including a reward by way of loan) direct or via an employee trust.

10.2. It is, however, abnormal and contrived for an employer to arrange long term funding of an employee trust and the provision of money to employees through the mechanism of the deeds of covenant, assignment of the benefit of these covenants and two tripartite deeds adopted in this case.

10.3. In this case we can see no reason, other than for tax purposes, to create a complex web of undertakings to pay, assignments of benefits of undertakings, and releases of obligations to pay, so as to provide funding to the EFRB and money to the employees. Had the EFRB been funded in the normal way by cash from BCD Ltd, and the EFRB trustee lent funds to Mr J and to Mr K, none of BCD Ltd, Mr J, Mr K or the EFRB would have been in a substantially different economic or commercial position. And there would have been no need to involve Trustee, other than as EFRB trustee in the arrangements.

10.4. We are of the view that, taken together, the steps comprising the tax arrangements are abnormal and contrived.

11. *Is what was done consistent with the principles on which the relevant legislation is based and the policy objectives of that legislation (section 207(2)(a) FA 2013)?*

11.1. The resulting commercial position is one in which:

a) BCD Ltd’s assets are reduced by about £220,000;
b) about £120,000 is made available by BCD Ltd to Mr J and about £100,000 is made available by BCD Ltd to Mr K, in each case in connection with their employment;
c) Mr J owes about £120,000 to the EFRB and Mr K owes about £100,000 to the EFRB. Mr J and Mr K and their respective relatives and dependents are beneficiaries of the EFRB.

11.2. The overall policy objective of section 62 and Part 7A is clear; employment rewards (including loans from employee trusts) are to be taxed on the sum of money available to the employee.

11.3. Part 7A was introduced in FA 2011 as an anti-avoidance measure to stop employers and employees sidestepping the policy decision that income tax should apply to rewards from employment (including rewards by way of loan from employee trusts), and apply at the time the employee has access to the reward.

11.4. Given the resulting commercial position, in our view the most likely comparable commercial transaction, if the aim of avoiding Part 7A was not an issue, is a funding by BCD Ltd of the EFRB followed by a loan from the EFRB trustee to Mr J and to Mr K (the terms of repayment mirroring the debt payment terms in the existing agreement).

11.5. The most likely comparable transaction gives rise to a charge to income tax under Part 7A.

11.6. The intended outcome for BCD Ltd of the steps taken is accordingly not consistent with the policy objectives of, or the principles behind, section 62 and Part 7A.

11.7. The overall scheme for corporation tax deductions on rewards and benefits to employees is to align the timing of the employer's deduction with the point at which the employee suffers tax.

11.8. The deductibility of BCD Ltd's contribution to the EFRB of about £220,000 should not, as a matter of principle, be affected by the inclusion in the arrangements of the very small (about 0.5%) contribution to the Initial Sub Fund.

11.9. The intended outcome for BCD Ltd of not only an upfront deduction for sums appointed to the Initial Sub Fund and on which an income tax charge arises, but also an upfront deduction for the contribution of the debt of about £220,000 without an income tax charge in respect of that element, is not consistent with the policy objectives of, or the principles behind, Chapter 1 of Part 20 CTA 2009.

11.10. However, in the most likely comparable transaction the time of the corporation tax deduction is linked to the time when Mr J and Mr K suffer tax on their rewards so, consistent with Chapter 1 of Part 20 CTA 2009, an upfront deduction would be available to BCD Ltd since there would be a charge under Part 7A on the loan from the EFRB.

12. *Is there a shortcoming in the relevant legislation that was being exploited (section 207(2)(c) FA 2013)?*

12.1. The arrangements provide Mr J and Mr K with what in substance is a loan from the EFRB. A conventional loan from the EFRB would have been taxable under Part 7A.

12.2. On its face, for the Part 7A loan charge to apply a direct provision of funds by a third party to the employees is required. Here BCD Ltd is seeking to achieve the economic equivalence of a payment of money by a third party (EFRB) but engineer the flow of money so it comes from a non third party (the employer, BCD Ltd).

12.3. This looks like an attempt to exploit a perceived shortcoming in Part 7A.

12.4. Paragraph C5.8.1 of the Guidance states "*It is often the case that perceived loopholes in tax legislation are very narrow, and that to squeeze through them requires the adoption of some step or feature that would not otherwise have been taken."*

12.5. Paragraph C5.9.1 of the Guidance looks at how a shortcoming might arise "*This may be because the tax rules have a defect that was not apparent to the drafter, or the drafter may not have contemplated that a particular type of transaction could be carried out (whether to come within the rules or to keep outside them)."*

12.6. Paragraph D2.7 of the Guidance provides guidance on this section 207(2)(c) FA 2013 circumstance. Paragraph D2.7.1 states: *"The GAAR is intended to … make sure that "keep off the grass" warnings are heeded."* Paragraph D2.7.2 sets out particular examples including "*devising contrived ways of circumventing the disguised remuneration rules".*

12.7. We think it inconceivable Parliament wished, particularly in anti-avoidance legislation like Part 7A where the policy intent is clear, to treat the result of a series of contrived steps as tax free when the result of economically equivalent simple steps was, and was intended to be, taxed.

12.8. In our view the income tax position is clear. The steps in this case are designed to exploit a perceived shortcoming in Part 7A.

12.9. The position on corporation tax deductibility is in our view equally clear, a small taxable benefit from the small Initial Sub Fund should not affect the deductibility of contributions to the Conventional Sub Fund and if it does, there is a shortcoming in the legislation.

13. *Does the planning result in:-*

(i) an amount of income, profits or gains for tax purposes which is significantly less than the amount for economic purposes, or

(ii) deductions or losses for tax purposes which are significantly greater than the amount for economic purposes, or

(iii) a claim for the repayment or crediting of tax which has not been and is unlikely to be paid

and, if so, is it reasonable to assume that such a result was not the intended result when the relevant tax provisions were enacted (section 207(4) FA 2013)?

13.1. Section 207 (6) provides that "*The examples given in subsections (4) and (5) are **not** exhaustive."* (emphasis added)

13.2. The specific examples in section 207(4) FA 2013 carry little weight (one way or the other) in cases where, like Part 7A, the charge is explicitly on a position different to the economic position and where, like section 1290 CTA 2009, a deduction is expressly denied or deferred.

14. Was what was done consistent with established practice and had HMRC indicated its acceptance of that practice (section 207(5) FA 2013)?

14.1. HMRC maintains that there is no relevant established practice to consider in this case.

14.2. HMRC's position is consistent with the position taken by the taxpayer in the Earlier Similar Case.

15. Discussion

15.1. Mr J and Mr K received about £120,000 and about £100,000 respectively from their employer, BCD Ltd, under an arrangement to motivate and incentivise employees. Mr J and Mr K had use of those monies, albeit subject to contractual obligations to the EFRB akin to those of a loan repayment.

15.2. BCD Ltd would undoubtedly like to see the following tax position:

a) no immediate charge to income tax (the employee benefits charging provisions in Part 7A do not apply);

b) an immediate corporation tax deduction for the full amount contributed to the EFRB (the usual corporation tax deduction provisions for unpaid remuneration do not apply).

15.3. In our view the most likely comparable commercial transaction, if the aim of avoiding Part 7A was not an issue, is a funding by BCD Ltd of the EFRB followed by a loan from the EFRB trustee to Mr J and Mr K (the terms of the debt payment mirroring those in the existing agreement).

15.4. The arrangements in this case are similar to those in the Earlier Similar Case (see 5 above) and we reach the same conclusion for similar reasons in this case.

15.5. BCD Ltd in this case seeks to avoid tax on a commercial outcome targeted by Part 7A. BCD Ltd and its advisers identified a potential shortcoming in wide–ranging "keep off the grass" anti-avoidance legislation. That shortcoming is seen to exist because the relevant statutory provisions in Part 7A dealt expressly with the straightforward position of an employee trust advancing monies to an employee. Part 7A did not expressly deal with complex economically equivalent arrangements. BCD Ltd, following advice, adopted a series of carefully orchestrated and contrived steps to exploit this perceived weakness in the legislation.

15.6. It is inconceivable Parliament intended the contrived arrangements in this case to fall outside of the Part 7A charge.

15.7. The deductibility of BCD Ltd's contribution to the EFRB of about £220,000 should not be affected by the inclusion in the arrangements of very small amounts appointed to the Initial Sub Fund (about £1,000, or 0.5% of the contribution).

15.8. In our view neither the entering into nor the carrying out of the complex steps in this case amount to a reasonable course of action in relation to the provisions charging tax on and giving deductions for employee rewards (including rewards by way of loan).

15.9. Each of the circumstances set out in section 207(2) FA 2013 point unambiguously towards both the entering into and the carrying out of the steps as not amounting to a reasonable course of action in relation to the relevant income tax, PAYE and corporation tax provisions:

a) the substantive results of the steps taken are not consistent with the principles on which Part 7A and Chapter 1 of Part 20 CTA 2009 are based;
b) the means of achieving the intended result relies on contrived and abnormal steps, in particular the creation and assignment of debt obligations (where the use of cash would have been more natural, and cheaper), so that BCD Ltd could argue the EFRB did not provide monies to Mr J and Mr K; and
c) the steps are intended to exploit shortcomings in Part 7A, and in particular the prescriptive way in which the legislation appears, on a narrow construction, to deal with payments of money by third parties.

15.10. In this case a taxpayer and its advisers identified a potential shortcoming in wide–ranging "keep off the grass" anti-avoidance legislation. By adopting a series of carefully orchestrated and contrived steps the taxpayer and its advisers sought to frustrate the intent of Parliament and gain an unfair and unintended tax "win".

16. Conclusion

Each of the sub-Panel members is of the view, having regard to all the circumstances (including the matters mentioned in subsections 207(2)(a), 207(2)(b), 207(2)(c) and 207(3) FA 2013) and taking account of subsections 207(4), 207(5) and 207(6) FA 2013, that:

a) the entering into of the tax arrangements is **not** a reasonable course of action in relation to the relevant tax provisions; and

b) the carrying out of the tax arrangements is **not** a reasonable course of action in relation to the relevant tax provisions.