HM Treasury, 1 Horse Guards Road, London, SW1A 2HQ

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Dear Harriet

MEMORANDUM ON THE FINANCE BILL PROVISIONS WITH RETROSPECTIVE EFFECT

In the Twentieth Report of the 2008-09 session, the JCHR recommended that in the future a memorandum be provided to the Committee identifying provisions in the Finance Bill which have retrospective effect.

I am pleased to attach a memorandum to meet that request with respect to the current Finance Bill.

Jesse

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HM TREASURY

HM Revenue & Customs

FINANCE BILL

Introduction

1. This memorandum highlights provisions in the Finance Bill 2019-21 which have retrospective effect and sets out the justification for that retrospectivity.

2. The Government's view is that all provisions in the Finance Bill 2019-21, including those with retrospective effect, are compatible with the rights protected under the European Convention on Human Rights (ECHR). The Chancellor of the Exchequer has, accordingly, made a statement of compatibility under section 19(1)(a) of the Human Rights Act 1998.

3. Finance Acts invariably contain measures which have retrospective effect. Background information on the different categories of retrospective provision typically found in a Finance Act can be found in the memorandum covering the Finance Bill 2009-2010.

4. The analysis of compatibility with the ECHR turns to a significant extent on the degree to which a person is deprived of legal certainty by being unable to predict the legal consequences of his or her actions. In this light, a distinction may sensibly be drawn between legislation which imposes a set of legal consequences of which a person cannot be aware because his or her action pre-dated any possible awareness of the legislation (unannounced retrospective effect), and legislation which imposes a set of legal consequences of which the person is aware because the proposal to legislate has been announced in sufficient detail, and the legislation is not to be made to apply from a time before the making of the announcement (announced retrospective effect).

5. This memorandum does not mention announced retrospective measures unless they were announced in year (i.e. not as part of the Budget, as it is well known that measures are commonly announced on Budget day to have retrospective effect from that day or later). Nor does it mention retrospective measures which have no charging effect on the taxpayer or which make a minor technical correction.

6. In this memorandum, Article 1 of the First Protocol to the ECHR is referred to as 'A1P1'.

'Unannounced' retrospective measures

Clause 35: Lease Accounting Standards minor amendments to clarify the scope of legislation on changes of lease accounting standards introduced in Finance Act 2019

1. This measure retrospectively removes a potential ambiguity from the wording of provisions in Schedule 14 to the Finance Act 2019, which made changes to the income tax and corporation tax rules for leasing transactions. The changes will be deemed to have effect for all periods of account beginning on or after 1 January 2019. The original changes were required to maintain the tax treatment for lessees adopting a new lease accounting standard from 1 January 2019. Schedule 14 introduced legislation which required accelerated tax debits arising as a result of the change in accounting treatment to be spread over the remaining lease term. This measure puts beyond doubt that those spreading provisions apply to all lessees adopting the new accounting standard for a period of account beginning on or after 1 January 2019.

2. The Government considers that the measure is compatible with human rights. A claim to a tax relief which has not been made out in a court or tribunal is not sufficiently established to be a 'possession' under A1P1 (*R (on the application of Huitson) v HMRC* [2011] EWCA Civ 893). By analogy, the Government considers that a claim for a tax deduction is not a possession for the purposes of A1P1.

3. In any event, in most (if not all) affected cases, it is likely that the taxpayer will not have claimed the accelerated deduction before Royal Assent of the next Finance Bill. The Explanatory Note published with the legislation made clear that the spreading rules were intended to apply to late adopters, so that it is difficult to see that affected taxpayers would have had a legitimate expectation that they would be able to claim the accelerated deduction which could attract the protection of A1P1.

4. The Government considers that this measure has the legitimate aim of ensuring that all taxpayers who adopt the new accounting standard in an accounting period beginning on or after 1 January 2019 receive the same tax treatment, and that an unintended loophole which would allow deductions to be accelerated by some is closed. This is in the public interest due to the potentially substantial tax at risk. In *National & Provincial Building Society v United Kingdom* [1997] 25 EHRR 127, the

ECHR expressly recognised that retrospective taxation can be applied to remedy technical deficiencies in the law.

5. Any interference caused by this measure is justified and proportionate and strikes a fair balance between the public interest objective of Exchequer protection, and the rights of affected taxpayers within the state's wide margin of appreciation. This measure effectively restores the tax treatment to what it would have been had the new accounting standard not been introduced, irrespective of when the new accounting standard is adopted.

Clause 101 HMRC exercise of officer functions

6. This clause will clarify with retrospective effect that any taxation function conferred upon an officer of Revenue and Customs may be done by HMRC at large, whether by the use of a computer or not. The measure codifies the decision of the Upper Tribunal in Rogers and Shaw that held that 'HMRC' and 'officer of revenue and customs' were synonymous and that despite a function being given specifically to an 'officer of revenue and customs' it could be carried out by HMRC at large rather than a named flesh and blood officer in each case. This particular case concerned the issuing of notices to submit income tax self-assessment tax returns under s 8 of the Taxes Management Act 1970 (TMA) which HMRC has, since the inception of self-assessment, done mechanically through the use of a computer programme and large-scale printers. Millions of such notices are issued annually and it would not be feasible (and would in any event be a grossly disproportionate use of public funds) to carry that exercise out manually by an officer for each notice.

7. The Government considers that this measure is compatible with human rights.

8. First, there is a reasonable basis for regarding any claims and potential claims that could have been made against HMRC but for this measure as being insufficiently established to constitute a possession for the purposes of A1P1. The Rogers and Shaw judgment already confirms the Government's position with respect to s 8 of the TMA and the decision is at least highly persuasive with respect to other officer functions being carried out by HMRC at large. In any event, this measure pursues the legitimate aim of restoring certainty to an important aspect of the tax administration framework and it is proportionate to that aim as it does no more than regularise a position thought to be held, without interfering with any substantive liability. It removes the ability to bring unmeritorious challenges against the means by which a function is carried out while retaining the ability, where otherwise available, to bring both meritorious

challenges to decision making and substantive challenges to the actual decision. In short, if a taxpayer has a genuine substantive case, this measure does not interfere with that right.

9. Secondly, assuming that Article 6 ECHR is engaged in relation to any challenge, we consider that the interference with a claimant's right to air the arguments is proportionate and justified and satisfies the test of there being a compelling reason in the public interest. The Government considers that any attempt by a taxpayer to take advantage of a technicality would be an effort to frustrate the intention of Parliament.

10. Finally, the legislation does no more than maintain the procedural position which many relevant taxpayers would have assumed that they were in. It does not affect any taxpayer's ability to continue to argue before the tribunals or courts as to what their actual tax liability is. A written ministerial statement was made on 31 October 2019 putting taxpayers on notice of the Government's intention to legislate retrospectively in this area. The retrospective effect of the legislation excludes taxpayers with decided cases in their favour before that date in which HMRC did not appeal.

Clause 102 Limited Liability Partnership Returns

11. This clause retrospectively ensures that Limited Liability Partnerships (LLPs) which do not carry on a business etc. with a view to profit are treated for tax administration purposes in the same way as LLPs operating with a view to profit. As a matter of general law, LLPs are bodies corporate. For tax purposes LLPs carrying on a business etc. with a view to profit are treated as partnerships, and their members as partners. This means such LLPs do not pay corporation tax on their business profits; instead their members are taxed to income tax on their individual share of the LLP's profits.

12. Current practice is for HMRC to issue LLPs with a statutory notice to make partnership returns under s 12AA of the TMA and for LLPs to make such returns. Once an LLP makes such a return, HMRC is able to enquire into the return, and notice of such enquiry is also treated as notice of an enquiry into each partner's individual tax return. HMRC may amend such a partnership return, and the partners' own individual returns, on closure of the enquiry. HMRC's policy and practice has been in effect since 6 April 2001 (by virtue of the Limited Liability Partnerships Act 2000 which introduced the deeming provisions for tax purposes).

13. This practice was challenged by a First-tier Tribunal (FtT) decision in June 2019 (*Inverclyde*). That decision held that where any LLP has made a

return under s 12AA TMA, the LLP/members can argue that the partnership return and subsequent HMRC activities following the return are invalid, as the LLP should have made a return under the corporation tax administration framework. The LLPs in this particular case are ones which HMRC considers are not carrying on a business etc with a view to profit.

14. This legislation confirms that all future and historic returns that have been made under s 12AA TMA by LLPs which are not carrying on a business etc with a view to profit, and all subsequent actions taken by HMRC in relation to such returns, are valid to the extent that they would be in the case of returns made by LLPs which are carrying on a business etc. with a view to profit.

15. The Government considers that as *Inverclyde* is a non-binding FtT authority that is wrongly decided and under appeal, the legal claim is not sufficiently established so as to constitute an A1P1 possession for taxpayers other than those party to that decision who are specifically excluded from the application of the measure. Alternatively, if Convention rights are engaged, the measure is compatible with A1P1 as it is a justified and proportionate means of achieving the legitimate aim of remedying a technical defect in the existing law and regularising the position of all LLPs, including by ensuring that some taxpayers do not benefit from avoidance strategies. This change falls within the UK's wide margin of appreciation with respect to tax matters.

'Announced' retrospective measures

Clause 25 Corporate Capital Loss Restriction

16. This clause introduces a restriction on the amount of carried-forward allowable capital losses that a company can set against chargeable capital gains that arise in a later accounting period. The legislation as a whole has effect in relation to accounting periods beginning on or after 1 April 2020 (with transitional provisions for accounting periods straddling that date) however, there is an anti-forestalling clause that has effect for accounting periods before 1 April 2020 where arrangements were entered after 29 October 2019 (the date of announcement of a consultation in relation to this measure) the main purpose of which is to avoid the effect of the measure.

17. A1P1 rights are engaged as the legislation seeks to restrict the amount of carried forward losses that a company can set against chargeable capital gains in an accounting period. The Government's view is that the legislation is justified as it falls within the wide margin of appreciation

enjoyed by states in the field of taxation. It ensures that companies pay tax on gains whilst continuing to obtain some benefit from past losses.

Clause 79 Call-off stock arrangements

18. This clause implements changes required by Council Directive 2018/1910. It amends the Value Added Tax Act 1994, including by inserting a new Schedule 4B, and the VAT Regulations 1995 to introduce new rules which simplify the VAT treatment of call-off stock moved from the UK to a member State or vice-versa. The measure applies to goods removed from the UK or a member State on or after 1 January 2020 – before the date of Royal Assent of the Finance Bill (and before the making of the intended resolution under the Provisional Collection of Taxes Act 1968) in order to better comply with the Directive which required member States to adopt and publish laws to comply with the directive by 31 December 2019 and apply them from 1 January 2020. The intention to make retrospective legislation was announced on HMRC's website on 31 December 2019 together with the publication of the draft legislation.

19. Since the legislation might, in rare circumstances, result in a taxpayer being liable for a greater amount of tax than it would have been if the legislation had not been made, or had not been made retrospective, A1P1 may be engaged in respect of the retrospection. The Government considers that this measure is justified as it has a legitimate aim of implementing an EU Directive, it is proportionate to this aim as it implements the change in the manner required by the Directive and it falls within the state's wide margin of appreciation in relation to tax.