Stephen Roberts
HM Revenue & Customs
Stamp Taxes Policy Team
Room 3/63
100 Parliament Street
SW1A 2BQ

30 January 2019

Dear Stephen,

Re: Stamp Taxes on Shares Consideration Rules

We are writing on behalf of the British Private Equity and Venture Capital Association ("**BVCA**"), which is the industry body and public policy advocate for the private equity and venture capital industry in the UK. With a membership of over 750 firms, the BVCA represents the vast majority of all UK-based firms, as well as their professional advisers and investors. Over the past five years (2013-2017), BVCA members have invested over £32bn into nearly 2,500 companies based in the UK. Our members currently back around 3,380 companies, employing close to 1.4 million people on a full-time equivalent basis ("FTEs") across the world. Of these, around 692,000 FTEs are employed in the UK.

The BVCA welcomes the opportunity to respond to this consultation. We note that there is nothing in the consultation document which indicates the rationale behind these proposed changes. It would be helpful to understand better why these changes are being proposed. Our impression is that some are for simplification only and others are to address certain behaviour.

We note that there appears to be some uncertainty as to whether there will actually be any exchequer impact from the proposed measures. This would suggest that there may be little relatively evidence of actual tax avoidance in this area. If this is the case, it would seem appropriate for any change in law should be proportionate to the extent of the perceived problem and suitably targeted at identified areas of mischief. Sweeping provisions which have potentially broad application may inadvertently impact "innocent" arrangements and, at the very least, result in a burden and cost on businesses to navigate yet further legislative provisions, should be avoided if such provisions are directed at behaviours which have relatively little financial impact.

Extending the market value rule

It is proposed that the rule introduced in 2018 that, for stamp duty and SDRT purposes, transfers of publicly listed securities between connected parties are treated as taking place at market value be extended to apply to private companies. This is stated as being designed to "level the playing field and minimising the scope for continuing avoidance." We would make a number of observations in this regard.

Much will depend upon precise definitions, specifically the definition of the word "connected" – it would be helpful if the definition were clear and unambiguous and did not leave open the possibility of broad application of the legislation. In this regard, it is helpful to note that existing stamp duty reliefs will be retained if this change is introduced, but, given the group exemption for stamp duty, it does raise concerns as to how broad the intention is in this regard since, presumably, the idea is that parties could be ineligible for group relief but still connected for the purposes of these rules. This may, unless carefully drafted, result in instances where certain structures are unfairly penalised and is also linked to the question of how much revenue is actually expected to be generated by this measure.

In terms of the interaction between existing reliefs and the new rules, careful consideration may need to be given e.g. relief under s77 on share for share exchanges. Will this need to be at market value if between connected parties and the new rule is introduced or will the relief "trump" the need for market value entirely? In wider terms, it needs to be borne in mind that some of the reason why parties may engage in alternate structures affected by the proposals is that although a commercially motivated group reorganisation or similar may technically fall within a relief the adjudication process for the relief creates an issue with deal timetables and the need for certainty. Should the proposals have to be adopted we would therefore hope these were accompanied by accelerated pre-transaction clearance procedures in order to address this.

Despite the observation in the consultation that securities in unlisted companies frequently require valuation for other tax purposes, this is not universally the case and the need for additional valuations would place a considerable burden on businesses in circumstance where valuation is required solely for stamp duty purposes. Additionally, there might be circumstances e.g. in pre-sale restructuring, in which the market value rule might result in multiple payments of stamp duty during the restructuring process, as opposed to a single payment on a final sale. This would seem to be contrary to the aims of the legislation, which is intended to target only arrangements where ultimate avoidance is the intention.

Given the technical rules governing the territorial scope of stamp duty, the introduction of the new rules may make the UK an unattractive place to conduct business generally. If merger or acquisition activity takes place under UK law and transfer documents could be required in the UK, there might be a technical need to consider valuation rules even for non-UK companies. This would be an undesirable result.

While we support the commitment to anti-avoidance, this proposal seems as though it could create more problems than it actually solves. In that regard, we would suggest that it might be more efficient to set out the targeted behaviours or arrangements, and consider whether it would be helpful to introduce a TAAR into the stamp duty legislation. By that means, the government can address avoidance, without introducing unnecessary complexity or issues.

Potential extension of the market value rule to connected parties other than companies

It is appreciated that the government is working collaboratively and seeking views on the potential extension of the market value rules to certain individuals, prior to actually proposing any changes. However, it is difficult to understand precisely what situations are being targeted and what perceived issues HMRC is seeking to address. We acknowledge that there are a number of areas which the rules would not be intended to catch but, again, we would suggest that any legislation is suitably targeted to areas where there is identified mischief. Again, it should be considered whether this might be better addressed by a specific TAAR.

In terms of potential burden on individuals, it would seem that obtaining valuations would not be something which an individual is ordinarily required to do and this might, accordingly, present an undue burden.

Aligning the definitions of consideration for stamp duty and SDRT

We welcome the idea of tax simplification and, accordingly, the alignment of the definition of consideration between these related taxes. However, given the aim of simplification, it appears to be incongruous to select the more complicated of the two alternative definitions. The definition of "money or money's worth" is much more open to interpretation and leads to the need for considerably more technical analysis, which would impact businesses of all sizes.

Of particular concern to our members is the limitations this proposal places on the availability of franking an SDRT charge. At 4.8 of the consultation, it is noted that transactions where the SDRT charge would no longer be franked include contributions to a partnership in exchange for a membership interest, distributions in specie out of a partnership in return for a redemption of partnership capital and contributions of assets to fund vehicles in consideration for an issue of fund interests. Imposing a stamp tax charge on these arrangements would have a disproportionate impact on the investment fund industry and would be a factor rendering the UK much less desirable as a jurisdiction for fund formation. These are already challenging times for the industry in light of the uncertainty surrounding Brexit and the increasing availability of fund structures in other jurisdictions and it is imperative to retain its competitiveness that the UK does not impose taxes which do not apply elsewhere. The approach of imposing additional taxes is also inconsistent with the government's aims of retaining the UK's position as an attractive jurisdiction for fund domicile as set out in Investment Management Strategy II in December 2017.

Accordingly, we would urge HMRC to reconsider this element of the proposals or to ensure that the investment fund industry is suitably protected by way of exemption. We should be happy to assist in drafting an appropriate exemption.

Aligning the rules on contingent, unascertainable and unascertained consideration

Again, we welcome the idea of tax simplification and the alignment of definitions between related taxes. This appears to be a question of establishing the most appropriate method as opposed to being targeted at any perceived avoidance, apart from the mention of manipulation at 5.7, which we consider to be practised only by a small minority of taxpayers.

We would question whether the SDLT approach is the most appropriate for all purposes. In many private equity transactions, the consideration is structured in such a way as means that it may not be fully ascertainable for a number of years. The potential need for "top up" payments and the length of time required for a final amount of stamp tax liability to be determined is potentially burdensome and creates uncertainty for businesses. We would welcome a method which provides a degree of finality for taxpayers within a fairly short timeframe.

In terms of SDRT and the use of estimates, the need to value "money's worth" may result in additional valuation needs, which is undesirable. Additionally, the same issues would be likely to apply regarding finality as with SDLT.

Accordingly, although no method is perfect, we would favour the stamp duty method and continued use of the contingency principle as giving taxpayers the greatest level of certainty. If another method is adopted then we would ask that any legislation allows for certainty and finality for taxpayers and does not leave open the possibility of repeated additions to payments and many years before final liability is known.

Conclusion

Appendix A repeats some of the contents of this letter in abbreviated form in answer to the specific questions raised in the consultation.

As this matter moves forward, we should greatly appreciate being involved in the process and discussing, in particular, any measure which especially impact the investment fund industry.

Yours faithfully,

Mark Baldwin
Chairman of the BVCA Taxation Committee

Appendix A – Questions & Answers

Q1: What would be the impact of extending the market value rule to all securities whether listed or unlisted?

Although the scope of this change would depend upon the precise definition of "connected" this could have potentially very wide application and create uncertainty for taxpayers.

Q2: What would be the impact on mergers and acquisitions?

This would inevitably result in an increased need for professional valuations, adding to transaction costs for businesses; additionally, there is the risk of multiple stamp duty payments and extra-territorial application.

Q3: Would there be particular impact on small or micro-businesses? What would be the impact on re-organisations of small family businesses? Please provide details of any one-off or on-going costs.

No specific comments.

Q4: What would be the impact of extending the market value rule to transfers to connected persons? In particular what would be the impact on individuals? Please provide details of any one-off or on-going costs.

In relation to individuals, they would be likely to be unduly affected by the need for valuations which is undesirable.

Q5: If the market value rule was extended to transfers to connected persons, what transactions do you consider should be carved-out? What would be the impacts if these transactions were caught by the measure?

No specific comments.

Q6: What would be the impacts of adopting 'money or money's worth' for Stamp Duty as well as SDRT? Do you have a view as to the extent that payments other than cash, stock or marketable securities, and debt are currently used to purchase securities?

It appears odd that a change designed with a view to simplification adopts the more complicated definition of two alternatives. The use of "money's worth" is relatively rare in transactions but it can be complicated to identify and value when it does arise. Accordingly, the compliance burden would be disproportionately great and we would recommend that the adoption of the stamp duty rather than SDRT consideration definition in order to align the two.

Q7: Would there be any particular impact on individuals, small businesses or micro-businesses from adopting 'money or money's worth' for Stamp Duty as well as SDRT? Please provide details of any expected costs.

Individuals, small businesses and micro businesses would be disproportionately impacted by a more complicated definition which may require them to seek technical advice to interpret, at consequent cost.

Q8: Do you consider there are specific exemptions which should be provided to protect the position of transactions where the SDRT charge is currently franked? If so, what are these transactions, how often do they arise and what would be the impacts of not protecting the position of these transactions?

We would strongly suggest that transactions among partners in partnership be excluded from the measure. If this is not done then the UK investment fund industry could be significantly impacted by these proposals. Partners in funds inevitably invest in exchange for a partnership interest and a tax on this initial investment would be highly likely to discourage the use of UK structures.

Q9: What are your views on adopting the SDRT approach to contingent, uncertain and unascertainable consideration for Stamp Duty? Would the need to determine the value of the 'money's worth' part of the consideration as at the date of the transaction create significant burdens?

We consider this route to present some complications in the need to value "money's worth" and the potential length of time for final liability to be known.

Q10: Would adopting the SDRT approach to contingent, uncertain and unascertainable consideration have particular impacts on smaller businesses and individuals? If so, what would these be?

No specific comments.

Q11: What would be the benefits and impacts of adopting the current Stamp Duty treatment of contingent, uncertain and unascertainable consideration for SDRT? Would there be any particular impact on smaller businesses and individuals?

This would seem to provide the greatest certainty for taxpayers and would be the route we would currently favour.

Q12: What would be the benefits of adopting the SDLT approach to contingent, uncertain and unascertainable consideration?

We do have concerns that this would lead to there being the need for "top up" payments and a significant time before final liability is known.