David Harris
HM Revenue & Customs (by email)

19 February 2013

Dear Mr Harris

Tax and procurement

We welcome the opportunity to comment on the discussion document and draft guidance issued on 14 February 2013.

This response is submitted on behalf of the British Private Equity and Venture Capital Association ("BVCA").

The BVCA is the industry body and public body advocate for the private equity and venture capital industry in the UK. More than 500 firms make up the BVCA members, including over 250 private equity, mid-market, venture capital firms and angel investors, together with over 250 professional advisory firms, including legal, accounting, regulatory and tax advisers, corporate financiers, due diligence professionals, environmental advisers, transaction services providers, and placement agents. Additional members include international investors and funds-of-funds, secondary purchasers, university teams and academics and fellow national private equity and venture capital associations globally.

This response has been formulated by the BVCA's Tax Committee, whose remit is to represent the interests of members of the private equity and venture capital industry in taxation matters. In making the comments below we wish to emphasise that we do not promote abusive or artificial tax avoidance by our members but nevertheless have some serious reservations about the proposals.

We believe that the proposals are disproportionate and discriminatory. Specifically:

- There is a system within the tax legislation for dealing with companies that undertake transactions which are defeated by reason of anti-avoidance legislation or otherwise. The penalties and interest that can be levied are already substantial. This proposal appears to provide for a double level of punishment for an action which is not even criminal in nature. We believe that the tax system should be self-contained with appropriate level of penalty and sanctions and the Government should not introduce a secondary regime of sanctions.
- The financial penalty from not awarding a Government contract or terminating one that is currently being undertaken could be disproportionate to the amount of tax avoided which is counteracted. We believe that there should be some deminimis and some relationship

between the size of the contract and the amount of tax that is said to have been avoided in order for these sanctions to be applied.

- On the Today programme on BBC Radio 4, an official said that the proposal was not intended to impact on taxpayers who sought to reduce their tax liabilities within the law. Surely a scheme for which the taxpayer has obtained a DOTAS scheme number has operated in accordance with the law and the sanctions appear inappropriate in this circumstance.
- We consider that there are multiple issues which require detailed consideration and the law may well be defective if it is introduced with the proposed level of haste.
- Much of the recent media coverage of so-called "tax avoidance has focussed on companies such as Google, Amazon and Starbucks. Under these proposals, it is assumed that these companies' ability to bid for Government contracts would be unaffected but another company that has perhaps only undertaken a relatively small tax planning arrangement which is counteracted would fail to win a contract.
- It is unclear what is meant by a "supplier". Is it just the Company bidding or undertaking a contract or is it all the related companies within the extended group? If the provisions are intended to extend to related companies, there needs to be more clarity on the degree of interconnection.
- In the context of the private equity/venture capital fund industry, portfolio companies may operate completely independently of each other but would be connected through a common general partner of the fund which controls them. Very frequently, the General Partner acts as solely in a shareholder capacity and is not involved in the day to day operations of the Company and may have no knowledge that the Company has undertaken tax planning which is deemed unacceptable. We would like assurance that if, for example, one portfolio company owned by a Fund has a transaction counteracted by the GAAR, this should not disqualify another company owned by the same Fund from bidding for a Government contract.
- We consider that these proposals puts UK companies at a competitive disadvantage with overseas companies established in jurisdictions which do not have a GAAR or DOTAS regime.
- How can the UK Government rely on disclosure where the act of tax avoidance has been committed abroad compared to the far easier detection options the Government has when the tax advantage is secured in the UK. This puts UK companies at a potential competitive disadvantage.
- We think there could be considerable difficulty in drafting contract termination clauses. Can either party terminate the contract if the supplier has had a GAAR counteraction? It opens the door to situations where the suppliers' services are critical to the Government so that there could be discrimination as between suppliers depending on the importance of the supply.
- Termination of a contract could have severe financial consequences for the supplier causing its business to fail. This penalises entirely innocent people such as employees who may lose their jobs, creditors who do not get paid and might, themselves, fail etc. This emphasises the potentially disproportionate nature of these proposals

- Suppliers may need to price in the costs of a potential termination into the pricing for the contract. At the time a contract is bid for, the supplier may not know that it will face a GAAR interaction as there is no experience of how HMRC will apply the GAAR.
- The Government may not be getting the best services or goods if it has to contract with second rate suppliers who have been more prudent in the management of their tax affairs. This proposal is likely to make public sector contracts less attractive as suppliers may feel that it is not worth the risk and not bid, removing some element of price competition as between potential suppliers.
- Maybe businesses caught by these rules should be barred from bidding from future contracts for a specific period of time, rather than terminating an existing contract which could have serious commercial consequences for both the supplier and the Government.
- We are concerned about the position where there is a change in ownership. Is the acquirer group to be impacted by issues in the company or group being acquired?
- The proposed ten year term from the date on which a Court decision is made is excessive. A court decision could be given many years after the "heinous" act and so effectively the sanction could apply for twenty or more years. The time limit should be set from the date on which the transaction being counteracted took place rather than the judicial decision.

In summary, whist we do not object to the Government introducing legislation to counter unacceptable tax avoidance and believe that with the proposed introduction of the General Anti-Abuse rule, a major step has been taken in that direction, we do not regard these proposals as sensible for all the reasons stated above.

Please feel free to contact me if you have any queries about this letter or if you consider that a meeting with BVCA representatives would be helpful.

Yours faithfully

David Marks
Chairman BVCA Taxation Committee