5 December 2017

Dear Harriet

MEMORANDUM ON FINANCE BILL PROVISIONS WITH RETROPECTIVE EFFECT

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

I am pleased to attach a memorandum to meet that request with respect to the Finance (No.2) Bill.

RT HON MEL STRIDE MP
FINANCE BILL

Introduction

This memorandum highlights provisions in the Finance (No.2) Bill which have retrospective effect and sets out the justification for that retrospectivity.

The government’s view is that all provisions in the Finance (No.2) Bill, 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.

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 first Finance Bill of 2010.

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).
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.

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

‘Unannounced’ retrospective measures
Clause 30: Reduction of relief in cases where losses relieved sideways etc. This measure aims to restrict the amount of credit allowed or deduction given in the UK for foreign tax suffered by a company with an overseas permanent establishment (PE) where the company has received relief for losses against non-PE profits in the foreign jurisdiction.

In such circumstances, the amount of double taxation relief available will be determined by the amount of foreign tax suffered by the overseas PE less the amount of reduction in foreign tax as a result of the losses of the PE being relieved against non-PE profits in a foreign jurisdiction in the same or earlier periods.

These changes will have effect for accounting periods ended on or after 22 November 2017. Any foreign tax paid by a company with an accounting period straddling 22 November 2017 will be allocated into notional periods falling before and after that date on a time apportioned basis but, where this does not give a just and reasonable result, on a more just and reasonable basis.

Whilst the foregoing is not seen as retrospective, to ensure the measure takes immediate effect a notional amount of foreign tax reduced is required and that is to be calculated by reference to such foreign tax reductions as have occurred in the preceding 6 years. This is thought to be retrospective.
The Government considers that this measure is justified, proportionate and falls within the state’s wide margin of appreciation. Here the state is pursuing the legitimate aim of taxing corporate profits through the corporation tax rules. There is a clear public interest to protect the public finances and ensure those who were in contemplation of the original regime are caught by it. Insofar as any exercise of the power is anti-avoidance, that is weighted in favour of the public interest, and in so far as any exercise of the power is relieving only, that is not, we suggest, contrary to either the interest of the public or of the individual taxpayer.

Clause 42: Landfill tax: disposals not made at landfill sites, etc. Of interest to this Committee, this clause will extend the scope of landfill tax from disposals of material at authorised sites to disposals at sites that are not permitted or licensed, but which ought to be (‘unauthorised sites’)

This will have limited retrospective effect in that it charges landfill tax where, on or after 1 April 2018, the Commissioners of HMRC become aware of material that has been disposed of at an unauthorised site. That material is treated as if that disposal takes place on the day that they become so aware, subject to a provision that prevents double taxation. The provision accordingly may cause tax to be charged on disposals that may, in fact, have taken place before commencement of this measure.

However, penalties and criminal offences may not be applied to acts prior to commencement.

Although A1P1 is engaged, the measure is necessary in the general interest and to secure payment of tax and proportionate and justified because it is already illegal to make disposals at unauthorised sites. Further, the material ought either to be recycled or disposed of at an authorised site (and therefore, would be taxed in any event). This measure ensures that persons are not advantaged by failing to have disposed of landfill appropriately and that the correct tax is paid.