International tax enforcement: disclosable arrangements - BPF response

To: Mandatorydisclosure.rules@hmrc.gov.uk
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Introduction

1. The British Property Federation (BPF) represents the real estate sector – an industry which contributed more than £100bn to the economy in 2018 and supported more than 2 million jobs.

2. We promote the interests of those with a stake in the UK built environment, and our membership comprises a broad range of owners, managers and developers of real estate as well as those who support them. Their investments help drive the UK's economic success; provide essential infrastructure and create great places where people can live, work and relax.

3. Almost a third of UK commercial real estate is owned by overseas investment and a further third are owned by collective investment vehicles (including funds and REITs), which cater to a global investor base. Given the international nature of the commercial real estate sector, we are keen to ensure that the reporting obligations on the sector are proportionate and avoid bringing purely commercial arrangements within scope.

4. Furthermore, while we acknowledge the policy rationale behind broadly drafting certain aspects of the legislation; this must be balanced with the resource implications this places on business to determine what should be reportable, by whom and when. To that end, we would encourage HMRC to provide clarity in respect of specific transactions of arrangements that either should or should not be reportable, wherever possible.

5. In the context of applying these rules to transactions/arrangements involving UK land, we note this is an area which has been subject to an intense period of legislative change in the last few years. In particular:

    5.1. The "Transactions in UK land" provisions, which took effect from 25 April 2016, tax profits of a trade from dealing in or developing UK land (including those arising from indirect disposals) regardless of whether or not those profits arise to a UK or non-UK tax resident company.

    5.2. From 6 April 2019, capital gains on direct and certain indirect disposals of UK land are within the charge to UK tax (capital gains tax or, in the case of companies or deemed companies, corporation tax).

    5.3. From 6 April 2020, non-resident companies owning UK land will come within the charge to corporation tax in relation to the profits of their UK property rental business (currently such profits are subject to income tax with the Non-Resident Landlord regime).

6. One of the stated objectives of these recent changes has been to "level the playing field" between UK and non-UK residents in relation to the taxation of UK land. Given that the taxing rights (in relation to income and gains) of the territory in which the land is located are safeguarded under double tax treaties, the scope for obtaining a tax advantage in relation to "cross border arrangements" in respect of UK land is significantly limited.

7. With that in mind, we consider that the jurisdiction of the investor in relation to ownership of UK property will not be of material relevance to the arrangement and therefore the fact that UK land or property is owned by a non-resident investor does not mean that the arrangement itself "concerns" multiple jurisdictions.

8. However, as there are a number of hallmarks which do not have a "main benefit test". We set out within the appendix some examples of typical commercially driven arrangements involving UK land, where the position may be less clear – and some general points where additional clarity would be helpful form HMRC.

9. We would be pleased to respond to any queries – and would also be please to arrange a meeting to discuss our sector in more detail and the potential implications of these rules for some of our members – do let us know if that would be helpful.

Yours sincerely,

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Appendix: Scenarios where additional clarity would be helpful

What is an intermediary?

10. While we appreciate that the broad definition of "intermediary" is somewhat intentional, any additional clarity that HMRC can provide will be helpful to businesses trying to apply the rules in practice – and also helpful to HMRC in limiting the number of reports received in respect of the same transaction.

When does an arrangement become reportable?

11. An arrangement could be reportable from as early as "the day after the reportable cross border arrangement is ready for implementation" or is "made available for implementation". Given this point in time is subjective, additional clarity from HMRC would be helpful to help ensure that businesses do not accidentally fall foul of penalties, simply by virtue of taking a different view of when an arrangement is "ready".

12. In the context of a real estate investment or structuring decision, we would suggest that a sensible trigger point for reporting would be when the reportable arrangement receives board level or investment committee approval. Particularly in cases where the reporting obligation rests solely with in-house tax or legal teams, it would be very difficult to track potentially reportable arrangements before they receive some senior level approval.

13. We are also concerned that the reporting requirements associated with funds could be unmanageable – particularly in the context of marketing to a widely held fund. In particular, the information required in respect of the arrangement is unlikely to be available at the point an arrangement could be deemed to be reportable. Please refer to paragraphs 30 onwards for our views on the treatment of collective investment vehicles more broadly.

Confidentiality clauses (Hallmark A1)

14. We would note that there is a risk that this hallmark could bring numerous arrangements within scope where they pose no tax avoidance risk. Given how common general confidentiality clauses are, for both commercial and regulatory reasons, it would be helpful for HMRC to provide further clarity around the kind of scenarios they would expect to be caught in respect of this hallmark. It would be helpful if this hallmark were clearly limited to specific tax confidentiality clauses rather than broader confidentiality clauses, and at the very least, where confidentiality clauses are overwhelmingly for commercial reasons or are required by some other regulatory body, these should explicitly not be caught by this hallmark.

Intra-group cross border transfers (E3)

15. It would be helpful if HMRC could provide additional clarity around when such arrangements might be reportable in real estate investment context. In most cases, we would anticipate that the jurisdiction of an investor in the context of UK land or property would not be of material relevance to the arrangement – as illustrated in the following example.

Example 1:

16. Within a group there is a transfer a UK investment property from a company resident in one territory to a company resident in a different territory.

17. The rental income is subject to UK tax both before and after the transfer, and any capital gain on the transfer is also within the charge to UK tax (although no gain or loss would arise if, as is likely, the provisions of section 171 TCGA 1992 would apply). To the extent that either company is not tax resident in the UK, it is unlikely that there would be any tax impact in the territory in which it/they are resident (either because it is not subject to tax, the tax rate is zero, there is a domestic relief, or the provisions of a double tax treaty apply).

18. Whilst such a transaction may not result in any "tax advantage", or have any tax consequences in a territory other than the UK, consideration would have to be given as to whether or not such an arrangement falls within hallmark E3 (applicable, inter alia to cross border transfers of assets) assuming the condition regarding the projected annual EBIT is satisfied.

19. The definition of "cross border arrangement" specifically includes situations where there is activity in one jurisdiction (i.e. in this case, the UK) by a participant (in this case one or both of the companies concerned) which is not resident in that jurisdiction (i.e. the UK) (article 3(18) of the DAC).

20. In paragraph 2.4 of the consultation document it is stated that "HMRC is of the view that in order for the arrangements to "concern" multiple jurisdictions, those jurisdictions must have material relevance to the arrangement".

21. Presumably in the circumstances set out above (where there are only UK tax consequences of the transfer), the only jurisdiction that would be required to be taken into account is the UK, and therefore the hallmark would not be satisfied?

22. It would also be helpful to have guidance in respect of equivalent examples where a UK entity invests in overseas land or property.

Transfer of assets where there is material difference in the amount being treated as payable in consideration (Hallmark C4)

23. There will be commercial situations where the full consideration may be deferred or not known by all parties and scenarios where the consideration may be valued differently by different parties involved. This may mean that it is only the taxpayer who would have the necessary information to report under this hall mark – assuming that the transfer is of material relevance – as set out in the example below.

    Example 2:

24. Shares in a company owning UK land are sold by a UK tax resident company to a third party non-UK tax resident company for a fixed price plus 'overage' payments: the 'overage' payments being "unascertainable" if they are dependent on future planning permission being obtained in respect of the land and/or any potential development profits realised.

25. In relation to the disposal by the UK tax resident company, depending on the specific facts and circumstances, it will be necessary to carefully consider the treatment of any capital gain, including the

application of the principles set out in Marren v Ingles (which could result in the disposal of a "chose in action") in relation to the consideration and whether the Transactions in UK land provisions apply. This would impact on the amount treated as consideration on the disposal of the shares and how this amount would be taxed.

26. However, in relation to the purchaser, who as a non-UK resident may be within the charge to UK tax on a subsequent disposal if the company is UK property rich, the amount which is treated as payable in consideration for the shares (if relevant) may be different.

27. It is unlikely that the seller or their advisers will have any detailed knowledge of the tax position of the buyer (or vice versa) in respect of such transfers.

28. In theory, Hallmark C4 (transfer of assets with material difference in consideration in the jurisdictions) could apply. However, it is assumed that paragraph 3.12 of HMRC's consultation document ("To be reportable by an intermediary, information must be in its knowledge, possession or control") would apply here, even if there is no intermediary and the buyer/seller would otherwise need to disclose?

29. Also as noted in example 1 above, it may be the case that it is only for UK tax purposes that the consideration is relevant.

Associated enterprise – collective investment vehicles (Hallmark C1)

30. Given the bulky nature of commercial real estate, collective investment is incredibly common. As indicated in questions 12 and 13 in the consultation document, the definition of associated enterprise to collective investment vehicles does require some further guidance/clarification to avoid "unnecessary reporting of benign activities".

31. One of the challenges with applying these rules to collective investment vehicles (CIVs), is that a 25% investor will not necessarily have the required information on the residence, investment structure or tax characteristics of other investors, and therefore will not have the requisite information to identify a reportable arrangement. It would be helpful if there was a specific carve out for collective investment vehicles, if only for clarity. However, at the very least, we would ask that HMRC clarifies that a widely held fund would not be deemed to be made up of associated persons, simply by virtue of the fact that the investors have a common fund manager who acts on their collective behalf.

Example 3:

32. A widely held real estate fund which is established in the form of a Limited Partnership which holds the shares in a company which then acquires a UK investment property. A loan is made by the partnership to the company to fund the acquisition of the property.

33. From 6 April 2020 the company will be subject to UK corporation tax in respect of its UK property rental business and the corporation interest restriction/anti-hybrid rules will apply where appropriate.

34. Based on the comments in paragraph 10.7 of the consultation document, in determining whether any of the hallmarks (within category C1) apply, if the partnership is treated as "transparent" for the purposes of determining who is taxable on receipt of the interest, it is necessary to determine the status of that person to the extent that they and the company are treated as "associated enterprises".

35. As a widely held real estate fund it is possible that one or more of the investors may be resident in a non-cooperative tax jurisdiction (per hallmark C1(b)(ii)), be a person who is not resident for tax purposes in any jurisdiction (per hallmark C1(b)(i)), or resident in a jurisdiction which does not treat the partnership as transparent and therefore arguably it is the partnership which is regarded as the recipient (and therefore hallmark C1(a) may apply).

36. Given that the fund manager is likely to have information regarding the residence of the investor, it cannot be assumed that the fund manager would not be aware of the potential application of these hallmarks.

37. However, as noted above, the hallmarks in C1 only apply in relation to cross border payments made between two or more associated enterprises. The question is therefore whether or not the partners in a widely held real estate fund would be regarded as an associated enterprise of a fund and the entities in the fund.

38. Per Article 1(1)(b) of the DAC *"For the purposes of Article 8ab, "associated enterprise" means a person who is related to another person in at least one of the following ways:*

    a. a person participates in the management of another person by being in a position to exercise a significant influence over the other person;
    b. a person participates in the control of another person through a holding that exceeds 25 % of the voting rights;
    c. a person participates in the capital of another person through a right of ownership that, directly or indirectly, exceeds 25 % of the capital;
    d. a person is entitled to 25 % or more of the profits of another person.

    If more than one person participates, as referred to in points (a) to (d), in the management, control, capital or profits of the same person, all persons concerned shall be regarded as associated enterprises.

    If the same persons participate, as referred to in points (a) to (d), in the management, control, capital or profits of more than one person, all persons concerned shall be regarded as associated enterprises.

    For the purposes of this point, a person who acts together with another person in respect of the voting rights or capital ownership of an entity shall be treated as holding a participation in all of the voting rights or capital ownership of that entity that are held by the other person."

39. In this particular case, there may well be an investor who, as a "seed investor" initially has a 25% stake in the fund and, more generally, in applying this test the question is whether all of the investors "act together" given that, in the case of a collective investment vehicle, it will be the fund manager e.g. the general partner of the partnership who will be managing the fund on behalf of the investors. In this regard, it would be helpful if HMRC could clarify that a widely held fund would not be deemed to be made up of associated persons, simply by virtue of the fact that the investors have a common fund manager who acts on their collective behalf.

40. Also as noted in example 1 above, it may be the case that it is only for UK tax purposes that the payment of the interest is relevant.