CORPORATE RE-DOMICILIATION

CONSULTATION RESPONSE

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INTRODUCTION

SUMMARY

The British Property Federation (BPF) represents the real estate sector, an industry which contributed more than £100bn to the economy in 2019 and directly employed more than 1 million people. 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.

We are supportive of the government's ambitions to strengthen the UK's position as a global business hub centre by introducing legislation that will allow companies to re-locate to the UK through re-domiciling.

We particularly welcome the government's proposals for re-domiciliation in the context of introduction of a specific tax regime for asset holding companies (AHCs) which is due to come into effect on 1 April 2022. For investors and fund managers looking to migrate their existing investment platforms to the UK to benefit from the new AHC regime, the ability to move an entity's corporate seat to the UK, alongside tax residence, will mean that both strategic management and corporate administration are able to be carried out in a single jurisdiction, simplifying and facilitating fund administration and management.

As a result, with the AHC regime taking effect from April 2022, we welcome the timing of the consultation on re-domiciliation and would encourage the government to introduce legislation enabling inward re-domiciliation quickly.

Our response to the consultation questions can be found in the attached Appendix. We have only answered questions most relevant to the real estate sector. Please contact Rob Wall, Assistant Director (Finance) at the BPF if you require any further information.

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APPENDIX: BPF RESPONSE TO CONSULTATION QUESTIONS

CHAPTER 2: RATIONALE FOR RE-DOMICILIATION

Question 1: What do you see as the advantages of re-domiciliation compared to existing routes to relocate a company to the UK, and how material are they?

We agree with the statements made in the consultation document that existing routes to relocate a company's corporate seat involve complex, lengthy and potentially costly processes, involving transfers of assets (including shares) to a new UK company.

For real estate groups in particular, the transfer of assets (whether shares or real estate) to a new UK company is likely to give rise to material tax costs, whether as a result of crystallising a latent gain in the "original" jurisdiction or because of the imposition of transfer taxes. Although, as referenced in sections 5.14 to 5.16 of the consultation document, a company moving its tax residence to the UK may be liable to an exit charge in the original jurisdiction in any event, the ability to re-domicile should mean that transfer taxes are not chargeable.

For investors in real estate that are attracted by the benefits of the new AHC regime, re-domiciliation should allow a "complete" migration of existing AHCs into the UK - with the result that both strategic management and day-to-day corporate governance and administration can be carried out in the same (single) jurisdiction. This should result in efficiencies, with (as a result) the potential for a reduction in costs.

Question 2: From what types of companies, and from which sectors, is there likely to be the most demand for re-domiciliation to the UK, and why?

The government has said that the new AHC regime will boost the UK's reputation as a funds domicile and enhance the UK's attractiveness as a location for AHCs. These rules should come into effect from 1 April 2022.

Investors and fund managers with existing platforms are likely to have established AHCs in non-UK jurisdictions to date (with, in the context of real estate investment, Luxembourg being a common jurisdiction in which to set up holding companies and, in some cases, real estate holding

companies). We would expect that a fund manager that is considering using the UK as a location for new AHCs would also be attracted by the possibility of migrating existing AHCs to the UK, so that (generally) the platform can be run from the same jurisdiction, reducing costs - particularly given the importance of being able to demonstrate substance in the AHC's jurisdiction of tax residence, particularly where tax treaty benefits are relevant.

Although it would be possible simply to migrate tax residence of existing AHCs to the UK to benefit from the AHC regime, this would not be as advantageous as moving both tax residence and corporate governance to the UK. For some investment platforms in particular, such as those with material UK management connections, having the option of being able to fully onshore existing investment vehicles - which re-domiciliation provides - could be particularly attractive.

Further, where existing AHCs are based in Luxembourg, there may in any event be challenges in migrating tax residence to the UK given certain Luxembourg corporate law requirements. Although these issues would not necessarily prevent the fund manager using the UK as the location for any new fund asset-holding vehicles, the need to maintain existing infrastructure in Luxembourg for those AHCs that need to remain outside the UK may make the case for setting up UK AHCs (and therefore having two "domicile" jurisdictions) a harder one to sell to investors - certainly at least in the short to medium term.

We therefore consider that allowing re-domiciliation to the UK would enhance the attractiveness of the new AHC regime to existing non-UK based fund platforms.

CHAPTER 3: ENTRY CRITERIA FOR RE-DOMICILING COMPANIES

Question 10: The Government's view is that an economic substance test is not necessary for re-domiciliation. Do you agree?

We agree. In our view, a non-UK incorporated company seeking to re-domicile to the UK should not be subject to eligibility criteria that do not apply to a new UK company registering under the Companies Act 2006.

Question 11: Are there factors that would influence your choice of place of incorporation within the UK?

As a practical matter, where a company looking to re-domicile to the UK has links with an existing UK group, we would anticipate that the company would look to re-domicile in the UK nation in which the majority of, or all, members of the UK group are incorporated - so the same company law requirements apply across the group as a whole.

Question 13: Do you have any views on how the regime should best ensure departing country conditions are met? Is there anything else we should consider?

As a general comment, the eligibility criteria appear reasonable in the context of a company effectively re-incorporating itself within the UK. As a practical matter, to the extent that specific information is required to be provided or certified by a "departing country" competent authority, it needs to be ensured that the competent authority would be in a position (and willing) to so provide/certify in a reasonable time period. In particular, (a) we assume that "authorisation" from the departing country is intended to be confirmation as to matters set out in the second column "proposed criteria" rather than "consent" per se and (b) the criteria need to be expressed in a "general" (rather than a UK-concept based) way so that they can be readily understood - and applied - by other jurisdictions by reference to their own requirements.

In relation to the requirement that a "wider impact" report be provided, we assume that regulations and/or guidance will clarify what it is intended that such a report should cover.

Question 19: The Government is not minded to prescribe a minimum turnover/size of companies that can re-domicile. Do you agree?

We agree. As set out above in response to question 10, we consider that a non-UK incorporated company seeking to re-domicile to the UK should not be subject to eligibility criteria that do not apply to a new UK company registering under the Companies Act 2006.

CHAPTER 4: OUTWARD RE-DOMICILIATION

Question 29: Would you be in favour of the UK introducing an outward re-domiciliation regime?

Generally speaking, we consider that any changes to the UK rules to facilitate inbound re-domiciliation should also permit UK incorporated companies to re-incorporate overseas.

However, we note that the consultation document states that the government is still considering the policy case for outward re-domiciliation (and that, if allowed, there is likely to be a need for various legislative safeguards which we expect would be subject to further consultation). Therefore, we assume that the timetable for introducing legislation allowing both inward and outward re-domiciliation as a single measure would be longer than that which would apply if only inward re-domiciliation were to be introduced at this time.

Given the benefits we see of proceeding with inward re-domiciliation alongside the new AHC regime, we recommend that inward re-domiciliation is proceeded with on a stand-alone basis for

now, with further measures (if any) for outward re-domiciliation following at a later date, rather than delay permitting inward re-domiciliation whilst policy considerations around outward re-domiciliation are worked through.

CHAPTER 5 - TAX

Question 37: Is clarification required as to whether a company will become or cease to be UK resident following a re-domiciliation to or from the UK?

We consider that the same rules relating to corporate residence should apply a newly UK re-domiciled company as to a newly UK incorporated company - so that a level playing field applies. A decision has to be made to re-domicile in the UK. The consequence of that decision is that the company is effectively re-incorporated in the UK - and under section 14 Corporation Tax Act 2009 (CTA), incorporation in the UK results in the company being UK tax resident (unless section 18 CTA applies). We see no reason for a different rule to apply simply because the newly UK re-incorporated company was previously incorporated elsewhere. Further such an approach provides a degree of certainty as to the timing of becoming UK residence (as it is based on the specific date of becoming a UK company, rather than when "management and control" can be said to have moved to the UK).

It should however be ensured that the rules appropriately cater for a company that migrates its tax residence to the UK (for example to benefit from the AHC regime) which then subsequently re-domiciles. Here, although certain tax consequences will follow re-domiciliation (e.g., stamp duty), residence (and the corporation tax consequences of that) would have already been established.

If the relevant company wishes to maintain tax residence outside the UK, then that option would be open to it (assuming it is "resident" in a jurisdiction with which the UK has a tax treaty and is able to satisfy applicable treaty conditions).

If outward re-domiciliation is to be provided for, we would suggest that re-domiciliation should result in the company ceasing to be regarded as UK incorporated (and so section 14 CTA would not apply) and so that it would only be UK resident if so resident under the management and control test (subject to the terms of a tax treaty).

We note that for companies that were, prior to re-domiciliation, resident in a non-UK jurisdiction, re-domiciliation could potentially give rise to questions of dual residence. Issues about dual residence cannot be resolved by UK domestic legislation alone. However, as above, a company would need to decide to re-domicile and so can, in its preparations for the move to the UK, take such steps as are open to it to manage its residence position to mitigate the possibility of disputes between tax authorities as to residence affecting its ability to claim treaty benefits.

Question 38: Which of the above options would be preferable and why?

Please see our response to question 37.

Question 39: Are there are any other options which should be considered?

No.

Question 40: Do you have any views on how material this risk is, and what additional protections might be introduced to prevent such loss importation?

As set out in the consultation document, there are a number of provisions that already apply to limit loss relief for losses that arose outside the UK. We note that the prescriptive nature of the UK's loss relief regimes may mean that not all factual situations in which a pre-re-domiciliation loss could be potentially offset against post-re-domiciliation profits will be addressed. We would be happy to comment on specific government proposals directed at areas where material risk of potential Exchequer loss has been identified (and where existing provisions may not be seen as providing sufficient protection).

However, in the real estate context, we note that for AHCs that own overseas land, the risk of loss importation is low given the exemption from corporation tax on overseas profits and gains conferred under Schedule 2 Finance (No 2) Bill (and the ring-fence that follows on from being a QAHC).

Finally, we note that consideration was given to the risk of imported losses when drafting Schedule 5 Finance Act 2019 (pursuant to which non-resident company landlords became chargeable to corporation tax). Schedule 5 included a number of provisions intended to manage the risk of double taxation/relief of amounts under the loan relationship and derivative contract regimes in particular. Both of these regimes include provisions to deal with companies ceasing to be UK resident (see sections 333 and 609 CTA) and so we recommend that the government consider whether specific provisions will be needed to deal with migration into the UK on re-domiciliation (in particular, including whether any amendments are needed to ensure that the Disregard Regulations apply appropriately to re-domiciled companies).

Question 41: Do you have any views on this?

For those companies looking to re-domicile to the UK who then elect into the AHC regime, Schedule 2 Finance (No 2) Bill would apply to govern the chargeable gains consequences of becoming UK tax resident. In practice, although assets would not be rebased on coming into the UK, as long as the company remains a QAHC, gains would be exempt - and there would be rebasing if and when the company ceased to be a QAHC. As a result, for such companies, a

specific measure linked to re-domiciliation should be unnecessary as paragraph 18 Schedule 2 should be able to apply to a change in residence resulting from re-domiciliation.

More generally, in our comments on the draft AHC legislation published in July 2021, we asked the government to consider exempting companies migrating to the UK that held non-UK land from the proposed entry charge (effectively resulting in a rebasing for such companies as a result of the combination of migrating to the UK and electing to be a QAHC). We continue to consider that, as a matter of policy, the UK should not look to tax gains that have arisen to a company prior to it being within the UK tax net and as a result ask that the government consider a general rebasing measure for companies that re-domicile to the UK (rather than as now a rebasing to market value only if the company has been taxed by the departing country under an exit charge: see section 184J Taxation of Chargeable Gains Act 1992). We note that there is precedent for rebasing on a company coming within the scope of UK tax in in Schedule 4AA Taxation of Chargeable Gains Act 1992 (and in any event we assume in any event paragraph 16 Schedule 4AA would apply to a company becoming resident as a result of re-domiciliation as it would to any other change in residence status - although this "fixes" rebasing at a particular date only).

If rebasing is not to apply, then we consider that any tax paid by the company in the departing country under an exit charge (or its equivalent) should be able to be used as a credit to offset any UK tax payable on an eventual disposal (the relevant foreign tax could be reported in the company's first CT return): although there would be a timing cost to re-domiciliation, this would mitigate any risk of double taxation on gains.

We assume section 185 TCGA would apply if a company ceased to be UK resident as a result of outward re-domiciliation as it would to any other cessation of residence.

Question 43: Do you have any views on the impact of the proposals for a re-domiciliation regime on STS?

As in our response to question 37, we consider that (in broad terms) a company that re-incorporates in the UK as a result of re-domiciliation should be treated for tax purposes in the same way as a company that newly incorporated in the UK. As a result, shares in and securities issued by the company would be UK situs assets for stamp duty/SDRT purposes from the date at which the company is re-domiciled - with transfers (and agreements to transfer) made on or after that date potentially chargeable to stamp duty/SDRT.

We have no comments on whether specific measures should apply where there is an outward re-domiciliation, other than to note that the terms of any proposed anti-avoidance measure should be as objective as possible (with a clearance/confirmation process available) so that migrating companies and their investors have certainty as to the treatment of future transfers.

However, we would note that because of the frictional costs that result from the application of stamp duties to transfers of shares and securities, there are cases where companies are set up as non-UK incorporated but UK tax resident companies: provided no UK register is created, then transfers of interests in the company should be able to be made without stamp duty or SDRT applying. Although out of the scope of this consultation, we would ask the government to consider possible changes to stamp duty/SDRT more generally. We note (and welcome) the specific measures proposed for the AHC regime (in relation to share repurchases) and also in relation to securitisation companies, but would ask that the scope of UK stamp duties is looked at more generally in light of the proposed re-domiciliation, noting that for some companies, re-incorporating in the UK will mean subjecting their investors to a tax charge on dealings in their shares and securities that did not previously apply.

Question 45: Do you have any views on any other tax consequences of a company re-domiciling in or out of the UK and whether any other amendments to UK tax law should be considered?

In general, our view is that a company re-domiciling to the UK should be subject to the same rules as a newly formed UK company. However, we note that some transitional relief in relation to compliance measures (for example, the timing of when they will apply) may need to be considered (for example, quarterly instalment payments).

A further point that should be considered is the application of withholding tax on interest payments. Under the multi-factorial test, the residence of the debtor (namely, where the debt would be enforced) is a relevant and generally important factor. Re-domiciling to the UK may lead to payments that could previously be paid gross becoming subject to withholding - although we note the technical position here is not clear-cut. Even if an exemption is available, there would potentially be administrative and other requirements to be met (for the company and, in relation to treaty claims, investors), and some of these would be time sensitive. For companies that re-domicile and become AHCs, a withholding exemption will apply under the new rules - but for other companies, the impact of withholding on their investors (and potentially for them, depending on the allocation of risk in contractual terms) could be a disincentive to moving to the UK. One possibility would be to provide specifically that existing non-UK source debt obligations remain non-UK source after re-domiciliation (confirming that the UK would respect source as and when the obligation was originated, and not view the act of re-domiciliation as having any impact on source).