Andrew Bonfield
Chairman: The 100 Group Tax Committee
c/o National Grid Plc
1-3 The Strand
London
WC2N 5EH
Direct dial: 0207 004 3033
E-mail: andrew.bonfield@nationalgrid.com

The 100 Group

Tax Committee

Via e-mail: andy.stewardson@hmrc.gsi.gov.uk

Andy Stewardson
HM Revenue & Customs
Room 3C/06
100 Parliament Street
London
SW1A 2BQ

9 September 2013

Dear Andy,

Consultation document: Modernising the taxation of corporate debt and derivative contracts

I am writing in my capacity as Chairman of The 100 Group Tax Committee to share with you our views on this recent consultation document.

Who we are

The 100 Group represents the views of the finance directors of FTSE 100 and several large UK private companies. Our member companies represent almost 90% of the market capitalisation of the FTSE 100, collectively employing over 7% of the UK workforce and in 2012, paid, or generated, taxes equivalent to 14% of total UK Government receipts. Our overall aim is to promote the competitiveness of the UK for UK businesses, particularly in the areas of tax, reporting, pensions, regulation, capital markets and corporate governance.

Our views

The 100 Group welcomes the intention to simplify and modernise legislation related to the taxation of corporate debt and derivative contracts. Although we have not sought to respond to every question posed within the consultation document, the following provide details on the areas we felt most compelled to give our views on. We have also detailed some specific responses to the questions posed which are included as an Appendix to this letter.

Is it necessary?

We believe the proposals put forward complicate and add uncertainty to the regime. The government would like the new rules to clarify the role to be played by a company's financial statements in identifying and quantifying taxable amounts. The current rules do an adequate job of identifying the role of the financial statements and quantifying taxable amounts. It is not clear that HMRC has made a compelling case for radically altering the current approach rather than through targeted measures in primary or secondary legislation. Whilst we understand the concern around tax planning in this area, we believe recent changes in legislation and the introduction of the GAAR, together with numerous anti-avoidance rules

already contained within the legislation, should provide further assurance that the transactions which seek to take advantage of loop holes in the law should no longer be effective.

Although the stated aim of the consultation draft is to review and update the regime to make it simpler and clearer, and at the same time more robust against avoidance, it would appear that the latter is the predominant driver. A complete overhaul of the rules seems an excessive step to take to address the mismatches that occur between tax and accounts in very few cases.

Timing

The proposed timing of the changes, were they to go ahead, is unhelpful. Business will need suitable time to digest any potential rule changes and to assess their impact.

The proposed changes rely heavily on the accounting treatment; therefore it is important that this is done at a time when the accounting rules are stable and not in a state of flux. We thus feel that both the proposed accounting changes under FRS 101/102 as well as IFRS 9 should be allowed to be finalised and fully embedded before the tax legislation is changed.

The two stage process proposed seems unduly complex and unnecessary: minimising the difficulties and uncertainties for taxpayers should be a priority in this process.

Use of accounting profit

The move away from an accounting basis of taxation, where it is perceived accounting doesn't produce an amount that fairly represents the economic profit, significantly increases uncertainty for the taxpayer. The proposals provide too much flexibility for HMRC to argue that the accounts don't result in a taxable amount that fairly represents the economic profit and means that the same transaction may be treated differently by different taxpayers.

Following the economic transaction instead of the accounts will further result in an additional compliance burden for the taxpayer. It is unclear to us as to how the taxpayer would calculate what fairly represents a profit, as we believe accounting profit as properly calculated under GAAP is generally recognised as the best measure of profit. If the proposed changes were to be introduced, any circumstances which require a deviation from the accounting treatment should be explicitly stated in the legislation.

We would encourage HMRC to re-expose an updated and amended consultation draft, to not only allow greater time for companies to further digest the impact of proposals made, but also to allow an appropriate timescale for implementation. I would be happy to further discuss the views made in this letter.

Yours sincerely

Andrew Bonfield
Chairman
The 100 Group Tax Committee

APPENDIX: Response to specific areas in the consultation document

Chapter 3: The framework

Q3.1 Do you think the approach outlined in Chapter 3 would provide a secure basis for determining the existence of matters within the scope of the regime and the taxable amounts?

We support HMRC's aim to clarify the role which is played by a company's financial statements in identifying and quantifying taxable amounts. We also agree that the starting point in identifying and quantifying any taxable amounts should continue to be amounts recognised in the company's financial statements. We do not consider the outlined approach provides a secure basis for determining matters within the scope of the regime and the taxable amounts.

Q3.2 If not, why not and how could the policy intentions be realised?

A significant amount of uncertainty and complexity would be caused by the proposals to diverge from the accounting treatment. We would encourage HMRC to consider why existing tools (GAAR, TAAR etc) are not sufficient to deal with avoidance activity, before introducing rules which create complexity and uncertainty for non-avoiding taxpayers.

Q3.4 Would it be helpful to make the categories set out in Figure 3 explicit in legislation?

Any circumstances which require a deviation from the accounting treatment should be explicitly stated in the legislation, with detailed guidance regarding how the "full amount of the profits, losses and gains" should be calculated in those instances. Failure to provide such clear and specific rules would substantially increase uncertainty and compliance costs for businesses.

Chapter 4: Looking behind the accounts

Q4.1 Do you agree with the rule proposed in paragraph 4.21 concerning the identification and measurement of amounts to be taken into account?

It is our strong preference that such a rule is not enacted as it will fundamentally undermine the certainty the current regime gives tax payers. In fact, the rule would entirely reverse the approach of the current regime, replacing it with a rule which will afford HMRC an unreasonable ability to re-focus transactions long after the commercial circumstances that surrounded the transaction have moved on.

Q4.2 In what circumstances should such a rule apply?

We are of the view that HMRC should use other means of achieving their objectives. However, if HMRC persisted with legislation requiring a deviation from the accounting profit, it would be very important that detailed legislation and clear guidance is provided to enable business to identify and quantify any additional amounts that are required to be brought within the charge to tax.

Q4.3 Do you anticipate any particular difficulties with the rule proposed in paragraph 4.21? If so, how might they be addressed?

Yes, outlined above. We feel the difficulties will be best addressed by maintaining the current regime (albeit the simplification and alignment of the Loan relationships and Derivative contract regimes is a welcome initiative) and using the GAAR and the other measures open to HMRC to address any abuse of the current regime.

Q4.3 Are there specific circumstances (other than where there is no material impact on tax outcomes) in which such a rule should not apply? If so, what alternative approach could be taken in such cases?

We believe the tenor of these questions assumes that the case for removing the certainty the current regime gives to both HMRC and taxpayers has been proven. For the reasons outlined above we do not agree with this assumption.

Chapter 10: Exchange gains and losses and hedging

We accept that the Disregard Regulations are complex which has in part been caused by several changes introduced over the years in relation to circumstances where the rules did not operate effectively or as intended. A simplification of the Disregard Regulations which continues to achieve their current objective of minimising overall cash tax volatility from economic hedges may be a better alternative to the proposals as currently drafted.

Chapter 14: Anti avoidance measures

Q14.1 Do you see any difficulties in adopting a "regime TAAR" along the lines set out above? If so, how could they be addressed?

In general we would not support the introduction of a Regime TAAR unless it was designed to target very specific instances of tax avoidance, with detailed guidance regarding when it would and would not apply. We would urge HMRC to pay particular attention to the drafting of such a TAAR to ensure it is not open to interpretation and does not therefore introduce further uncertainty for groups undertaking transactions which involve loan relationships and derivative contracts.

As is currently proposed, it would be important that any Regime TAAR was introduced in place of, and not in addition to, the existing specific anti-avoidance measures.

Chapter 15: Tax impact assessment

It is too early in the process to assess the overall tax impact of the consultation. This will not be foreseeable until draft legislation and sight of HMRC's guidance on the application of the new rules is available.