

Tim Power
HM Treasury
1 Horse Guards Road
London
SW1A 2HQ

Emailed to: Timothy.Power@hmtreasury.gov.uk

13 April 2023

Dear Tim

This letter has been prepared by the 100 Group Taxation Committee and is intended to speak on behalf of the Group as a whole. The 100 Group membership represents around 90% of the FTSE100 market capitalisation as well as a number of equally significant sized unlisted businesses. We note that whilst this letter expresses the views of the 100 Group as a whole, these views are not necessarily those of individual members nor their respective employers.

US Stock Repurchase Excise Tax

As part of the Inflation Reduction Act 2022 (“IRA”), the US introduced a non-deductible 1% Repurchase Excise Tax (“Excise Tax”) on share buy backs. This tax will be payable on repurchases of shares that take place on or after 1 January 2023.

We wish to register our concern regarding the draft guidance (Notice 2023-2) on this Excise Tax issued by the Internal Revenue Service (“IRS”) in December 2022. Specifically, we are concerned the guidance notice creates an extraterritorial tax on funds that have no connection to the US, extending the scope of the Excise Tax beyond what was intended in the IRA and potentially impacting a significant number of UK headquartered groups. We would therefore like to request that the UK government make representations to the US Treasury with the aim of securing amendments to the guidance set forth in Notice 2023-2 to address this issue, before future US Treasury regulations are issued.

Background

The IRA included an Excise Tax of 1% on the fair market value of repurchased corporate stock. While the IRA provision applies mainly to stock repurchases by US companies, it also includes an application to foreign corporations with US subsidiaries in certain circumstances, supposedly to address cases of avoidance. This was originally understood to be targeting corporate inversions.

Guidance Notice 2023-2 published by the IRS in December introduces two anti-abuse provisions to the Excise Tax which expand the scope of transactions deemed as covered:

1. “The Funding Rule”: Applies broadly to the funding of an acquisition or repurchase “by any means” undertaken for the principal purpose of avoiding the Excise Tax.
2. “The Per Se Rule”: Deems any payment (other than distributions) to a foreign parent to be undertaken for the principal purpose of avoiding the Excise Tax if occurring within two years of the stock repurchase.

These anti-abuse provisions were not included in the IRA legislation itself, so we consider it unlikely that it was the intention of Congress to legislate in such a broad manner.

Implications for UK parented groups

International businesses are a significant part of the US economy. More than \$5 trillion has been invested into the US economy by foreign companies. These companies employ 7.9 million US workers, account for 23% of total manufacturing employment and over the past five years have created 400,000 new US manufacturing jobs.

Taken together, the funding and per se rule would result in a 1% tax on any transaction from a US subsidiary to a foreign parent where the parent repurchases stock within two years. This is because the language “by any means” may capture any funding between a US subsidiary and its parent conducted within the ordinary course of business. For example: inventory purchases; payment for services; short term funding such as cash pooling; or IP and royalty licensing may be captured.

As a result, there may be significant revenue costs to UK parented companies. For example, where a UK parent company did an on market share buyback worth £500 million, but in a prior year the parent (or another UK affiliate) received a payment for services of \$100 million from their US subsidiary, the 1% tax may be levied on the \$100 million.

This Excise Tax may particularly harm those countries where stock repurchase is common. For example, over the last three years, over half of the FSTE 100 have undertaken stock repurchases.

The rules as announced in Notice 2023-2 create a new unilateral measure to tax foreign-headquartered corporations in direct contravention to the intention of Congress and the principles the US has taken in other areas of international taxation.

Request of the UK government

UK businesses, including I00 Group members, are already raising concerns with the US Treasury directly via relevant trade bodies on this matter. However, given the Notice effectively creates an extraterritorial tax on foreign funds, we believe it is important for the UK government to raise concerns directly with its US counterparts.

This problem arises in draft regulations issued by the IRS rather than in the legislation enacted by Congress, therefore it is well within the power of the IRS/US Treasury to make changes. Indeed, they have stated that they would consider “clearly defined” amendments as part of the consultation on the draft regulations in question.

In particular we would be grateful if the UK government request that the guidance be revised to:

1. Remove the Per Se Rule
2. Provide exceptions for ordinary course of business transactions
3. Modify the principle purpose test by allowing taxpayers to provide a separate valid business purpose for undertaking a transaction
4. Clarify the treatment of dividends and exclude pre-existing transactions from scope.

We thank you for the opportunity engage on this matter. Please do contact our secretariat Cat Hoad at secretariat@theI00group.co.uk should you wish to explore any of our comments in further detail and she will be very happy to arrange a further discussion.

Yours sincerely,



Andy Agg,
Chairman of the I00 Group Taxation Committee