

JUSTICE 2018 Solution of

Robert Venables Q.C.

Specification

Revised to 12 November 2018

**Outline of What The Solution is Intended to Achieve in What Circumstances**

*The Scenario and Solution in Outline*

*The Scenario and the Problem*

[Sections A to C are closely based on the language of Income Tax (Employment and Pensions) Act 2003 Part 7A and in particular section 554A.]

- A. The taxpayer, A, is an employee or former employee (including a director of former director) of a person B.
- B. There is an arrangement which involves a trust (“the Trust”) to which A is a party or which otherwise (wholly or partly) covers or relates to A. [This will typically be an employee benefit trust, whether or not it is called an “employee benefit trust”, which has been established by B for the benefit of B’s employees and persons related to or connected with them. A will be a discretionary beneficiary of the trust and the trustees will be empowered to pay to him any income and / or capital gains arising from any indebtedness of him to the Trustees. (If that is not the case, a variant of the strategy may well be possible.)
- C. It is reasonable to suppose that, in essence-
- (i) the Trust or
  - (ii) the Trust so far as it covers or relates to A,
- is (wholly or partly) a means of providing, or is otherwise concerned (wholly or partly) with the provision of, rewards or recognition or loans in connection with A’s employment, or former employment, with B.
- D. A is indebted to the trustees of the Trust (“the Trustee”) in that he is liable to pay it, whether now or at some time in the future, a sum of money. (In this Work Proposal, I treat, in accordance with United Kingdom income tax and capital gains tax law, the trustees of a settlement as being a single and continuing body of persons, distinct from the persons who may from time to time be the trustees. References to “the Trustee” accordingly include, unless the context otherwise requires, references to the Trustee or Trustees of the Trust from time to time.) I assume that the sum of money is in sterling.

(Justice 2018 can still work where the loan is not in sterling but there are additional complications, so that further advice would need to be taken in such a case.)

- E. If nothing is done, on April 5<sup>th</sup> 2019 the Trustee will be treated (by Finance (No 2) Act 2017 Schedule 11 (“Schedule 11”) as taking a “relevant step” (within the meaning of Income Tax (Employment and Pensions) Act 2003 Part 7A) in relation to A, the value of which will be (a maximum of) the amount of the debt owed by A which is “outstanding” as at that date. In consequence, A will be in principle be chargeable to income tax on an amount equal to the value of the relevant step (i.e. the amount of the loan or quasi-loan which is then “outstanding”) even though he then receives no economic benefit. Such charge is referred to as an “April 5<sup>th</sup> 2019 Charge”.
- F. There will be only one employer in relation to the arrangement in question and there will not have involved in the prior arrangements a close company which was not the employer but of which the employee is or was within the period of beginning three years before the Solution is begun to be implemented and ending at the end of April 5<sup>th</sup> 2019 both a director and employee and in which the employee had a “material interest” at any time during the same period.

#### *The Solution*

- F. The Solution involves A entering certain agreements. **It is an essential part of the Solution that B, the present or former employer of A, will still be in existence and in friendly hands.** (If this is not the case, some other solution will be needed.) The economic position of B would not be affected as, once the Solution had been fully implemented, it would have not have incurred any enduring liability or sustained any loss or be entitled to any enduring right or benefit. B would be like a catalyst in a chemical reaction. While it would take part in the Solution, its economic position would be totally unaffected by doing so.
- G. The Solution does require A to have cash temporarily. However, the cash can be provided temporarily by B. If not enough cash can be provided by B, the Solution may have to be repeated, using the same cash.
- H. Once the Solution has been implemented, A and the Trustee would be in the same economic position as before.

#### *The Perceived United Kingdom Tax Consequences of the Solution*

- J. It is believed that ,after implementation of the Solution, A would no longer be subject to the April 5<sup>th</sup> 2019 Charge.

#### *Work Proposed*

I would write a detailed written Opinion, explaining the Solution and how I believe it works. This would include a discussion of the draft documentation, which I would settle which would be used to implement the Solution. This would include draft minutes of a meeting of the Trustee, which would be settled on the basis that there was one corporate trustee only of the Trust. (If that were not the case, the draft minutes could be adapted as required.)

My Opinion would include an opening section PRELIMINARY headed along the following lines:

### **“My Clients**

1. This Opinion is written for the benefit of CITADEL LIMITED, my client. I undertake no duty of care or otherwise to any third party who may read it or otherwise come to learn of its contents. It concerns a solution I have created which I call “Justice” (“the Solution”). I have so named it because in my view it enables an unjust and essentially retrospective charge to income tax to be avoided.

### **My Competence**

2. I am a barrister and not an accountant. Any view I may express on a matter of accountancy is therefore an inexperienced view and should not be relied on. My understanding of the accountancy position generally should be checked with a suitably qualified person. My qualification is in English law and not in any foreign law (including foreign taxes). I have no qualification in the laws of any other part of the United Kingdom. I have no expertise in specialist areas of English law, such as employment law or insolvency law.

### **Copyright, Confidentiality and Disclaimer**

3. While copyright (and all other intellectual property) in this Opinion and in the other Opinions I have written or may in future write in this matter and in any drafts I have settled or may in future settle in this matter (“the Work Product”) is retained, they may be reproduced and shown by my client to its clients and the drafts may, with the consent of my client, be utilised by any of its clients (as well as by my client), but subject in each case to observance of the conditions more particularly described in the section of this Opinion headed “Licensing”. This licence of the Work Product is subject to the conditions set-out below in the section heading “Licensing”. It is also subject to the contents of the opinions and drafts being at all times kept confidential and being imparted to third parties only if a similar duty of confidentiality is imposed on them which is directly enforceable by myself. The obligation of confidentiality is, of course, subject to any duty imposed by the law e.g. compulsory disclosure in fact due under the DOTAS regime (but not voluntary or premature disclosure).
4. For the avoidance of doubt, the above clause is not intended to impose a **contractual** obligation which either
  - (i) “prevents or restricts the disclosure by any person to HMRC of information relating to” the matter on which I am currently advising, or
  - (ii) requires any person “to impose on any tax adviser to whom” any such client “discloses information relating to the arrangements”

discussed in this Opinion “a contractual obligation which prevents or restricts the disclosure of that information to HMRC by the adviser”

all within the meaning of Finance Act 2014 Schedule 34 (Promoters of Tax Avoidance Schemes: Threshold Conditions) paragraph 11 (Restrictive contractual terms).

This paragraph does not apply to non-contractual obligations.

5. This obligation of confidentiality is imposed to protect my intellectual property and work product and to prevent it being exploited by third parties without my client or myself being remunerated. It is not imposed in order to facilitate repeated or continued use in future of any element, or substantially the same element, of the arrangements described in this Opinion which secures, or which might secure, a tax advantage the obtaining of which might be expected to be the main benefit, or one of the main benefits, which arises from the arrangements.
6. However, I undertake no duty of care or otherwise to any person or entity other than my client who may come to read or otherwise learn of the contents of this Opinion or who may utilise the drafts. Any such person should take their own independent advice (which could be directly from myself) before acting or abstaining from action. My client is my only client.
7. My client agrees that if it sub-licences the Work Product to one of its clients, then its client may seek my advice as to the correctness of the Opinion(s) included in the Work Product and / or the fitness for purpose of the drafts included in the Work Product notwithstanding any technical conflict of interest which might exist between my client and its client.
8. This Opinion is written and the advice contained herein given on the Tax Chambers 15, Old Square, Lincoln’s Inn, Standard Terms and Conditions, except so far as otherwise agreed in writing. Those Standard Terms and Conditions contain in particular provisions relating to the limitation of the liability of the barrister. They also contain provisions relating to the send out or work by unencrypted email.
9. This Opinion is written on the basis of existing law. It may also take into account, where indicated, proposed future changes in the law which have been announced.
10. It should also be borne in mind that while retrospective tax legislation is in practice very rare, there is no constitutional constraint on Parliament enacting it, if it thinks fit, and arguments against it taking effect based on The Human Rights Act may not be received sympathetically by the courts. I cannot in general predict future changes in the law. It is for my lay client to weigh up, in the light of their own circumstances, the likely advantages and disadvantages of following any course of action on which I advise, in particular comparing that with the advantages and disadvantages of not

taking that course of action and either taking no course of action or some alternative course of action.

### **Specific Warning (“Barker”<sup>1</sup> Warning)**

- 11. I should warn that, while this Opinion contains my honest views as to the effectiveness of the Solution, it is likely to be perceived, rightly or wrongly, by HMRC as provocative and, if it comes to their attention that any taxpayer has implemented it, that implementation is likely to be challenged by HMRC. Any taxpayer intending to implement the Solution should bear that fully in mind and be prepared for potential hassle from HMRC. Moreover, it is possible that HMRC may serve one or more purported accelerated payment notices on the taxpayer, whether or not such accelerated payment notices are valid in law. Any taxpayer implementing the Solution should be aware of that too.**

### **Licensing**

12. My client is authorised to grant a personal and non-transferrable sub-licence for the use of the Work Product but only to a third party which is its client (such client being referred to as “C”) and for the following purposes only:
- (a) for implementation of the Solution by C itself and
  - (b) for the grant of a sub-sub-licence by C to the direct clients of C for implementation of the Solution by any such client of C.
13. For the avoidance of doubt, my client is not authorised to sub-licence the Work Product to any C on terms that:
- (a) C may assign or transfer by any means in whole or in part, whether at law or in equity, the sub-licence or any part of part thereof to a third party
  - (b) C may grant a sub-sub-licence to any person other than its direct client and purely for implementation of the Solution by that direct client
  - (c) (without derogating from the generality of the foregoing) that the sub-sub-licensee may grant a sub-sub-sub-licence to any other person in any other circumstances.”

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<sup>1</sup> See *Barker v Baxendale Walker* [2017] EWCA Civ 2056.