

LIBERATION 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 the Problem*

A. The taxpayer, T, is exposed in principle to a charge to income tax on April 5<sup>th</sup> 2019. He is so exposed by Finance (No 2) Act 2017 Schedule 12 potentially bringing into play Income Tax (Trading and Other Income) Act 2005 sections 23A to 23H (which are under the heading “Trading income provided through third parties” and to which I refer as the “TIPTTP”.)

B. In particular, the following conditions, contained in Income Tax (Trading and Other Income) Act 2005 section 23A will in principle be satisfied as regards T:

“(2) Condition A is that a person (“T”) is or has been carrying on a trade (the “relevant trade”) [or a professional or vocation: see subsection (9)] alone or in partnership.

(3) Condition B is that-

(a) there is an arrangement (“the arrangement”) in connection with the relevant trade to which T is a party or which otherwise (wholly or partly) covers or relates to T, and

(b) it is reasonable to suppose that, in essence-

(i) the arrangement, or

(ii) the arrangement so far as it covers or relates to T, is (wholly or partly) a means of providing, or is otherwise concerned with the provision of, relevant benefits.

[And see subsection (7) for the interpretation of this subsection]

(4) Condition C is that-

(a) a relevant benefit arises to T, or a person who is or has been connected with T, in pursuance of the arrangement, or

(b) a relevant benefit arises to any other person in pursuance of the

arrangement and any of the enjoyment conditions (see section 23F) is met in relation to the relevant benefit.

[Note, the Solution presupposes that only (a) will be in point. If (b) is in point, the Solution may or may not be viable but further advice will need to be taken in the circumstances of the individual case.]

(5) Condition D is that it is reasonable to suppose that the relevant benefit (directly or indirectly) represents, or has arisen or derives from, or is otherwise connected with, the whole or part of a qualifying third party payment.

(6) Condition E is that it is reasonable to suppose that a tax advantage would be obtained by T, or a person who is or has been connected with T, as a result of the arrangement.”

C. The condition in section 23A(4)(a) will in principle be satisfied at the end of April 5<sup>th</sup> 2019 by virtue of Finance (No 2) Act 2017 Schedule 12 paragraph 1(1) and (2), which provide:

“1(1) A loan or quasi-loan in relation to which sub-paragraph (2) applies is to be treated as a “relevant benefit” for the purposes of sections 23A to 23H of ITTOIA 2005.

(2) This sub-paragraph applies in relation to a loan or a quasi-loan if-

(a) the loan or quasi-loan was made-

(i) on or after 6 April 1999, and

(ii) before 6 April 2017, and

(b) an amount of the loan or quasi-loan is outstanding immediately before the end of 5 April 2019.”

D. The loan or quasi-loan will have been made by a person, usually the trustees of trust, (“the Trustees”) by T having become indebted to them to pay them a sum of money. [If the loan or quasi-loan in question is not of this type, the Solution may still be viable but further advice will need to be taken in the circumstances of the individual case.]

E. T is not in a position to secure (or does not wish to secure) that there will be no amount “outstanding” under the loan or quasi-loan by the end of April 5<sup>th</sup> 2019.

### *The Solution*

F. The Solution involves one document (a skeleton version of which is settled as part of the Solution) being entered into between T and the Trustees before April 5<sup>th</sup> 2019.

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

- J. It is believed that ,after implementation of the Solution, T would no longer be subject to the April 5th 2019 charge to income tax.
- H. Further, it is believed that T would not be subject to any other tax charge to income tax as an immediate consequence of implementing the solution.

### *Work Proposed*

I would write a detailed written Opinion (18301) 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 a skeleton draft agreement between T and the Trustees, settled on the basis that there is only one trustee of the trust and that it is a body corporate. It would also include draft minutes of a Board 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:

#### **PRELIMINARY**

##### **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 "Liberation 2018" ("the Solution").

##### **My Competence**

2. I am a barrister and not an accountant. Any view I may express on a matter of accountancy is therefore an inexpert 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.

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,

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<sup>1</sup>

See *Barker v Baxendale Walker* [2017] EWCA Civ 2056.

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.”