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Modernisation of the Stamp Taxes on Shares Framework

Response by the Chartered Institute of Taxation

1 Introduction

- 1.1 We refer to the call for evidence published on 21 July 2020 on the Modernisation of the Stamp Taxes on Shares Framework.
- 1.2 We welcome this work and agree that the Stamp Taxes on Shares (STS) framework needs to be modernised. This framework encompasses the legislation, guidance and administrative processes that allow HMRC to administer stamp duty and SDRT. We hope that this call for evidence is the start of a medium to long term project which will result in a new, modernised framework for STS.
- 1.3 As an educational charity, our primary purpose is to promote education in taxation. One of the key aims of the CIOT is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. Our comments and recommendations on tax issues are made solely in order to achieve this aim; we are a non-party-political organisation.
- 1.4 Our stated objectives are for a tax system that includes:
 - A legislative process which translates policy intentions into statute accurately and effectively, without unintended consequences.
 - Greater simplicity and clarity, so people can understand how much tax they should be paying and why.
 - Greater certainty, so businesses and individuals can plan ahead with confidence.
 - A fair balance between the powers of tax collectors and the rights of taxpayers (both represented and unrepresented).
 - Responsive and competent tax administration, with a minimum of bureaucracy.
- 1.5 With these aims in mind, we hope that this call for evidence is the first step and that there will be several stages of further consultations as the shape of a new STS framework is developed. We agree that it will be difficult to modernise the STS framework in a piecemeal fashion and will welcome consultation on specific policy and legislative changes that become apparent as the modernised framework takes shape. We look forward to being involved in this process.

2 Executive summary

- 2.1 We envisage a new, modernised STS framework which is based on a single tax which would:
- be based largely on the principles/scope of SDRT legislation but including the reliefs found in stamp duty; and
 - introduce a self-assessment system of tax, filed by way of a return (like stamp duty land tax (SDLT)/other taxes).
- 2.2 Ultimately, we envisage that the best outcome would be if legislation is consolidated and re-written to reflect the design and application of the new STS framework. Although the legislation will inevitably draw heavily on some aspects of existing legislation, one of the current difficulties with the existing STS framework is the piecemeal nature of the legislation, which makes the rules very difficult to navigate. It would be preferable, therefore, if the end result was a new body of legislation – whether an act or a schedule to a Finance Act – which puts all of the rules in one place.
- 2.3 In the interim we strongly suggest that the government makes such changes to the existing stamp duty rules as are necessary to enshrine the ‘virtual’ stamping procedures which have been so successfully implemented in response to the COVID-19 pandemic, and to address some of the unresolved issues (for example around submitting actual documents in the future) to provide taxpayers with appropriate comfort in respect of the virtual procedures.
- 2.4 In the shorter term, we would not recommend any material changes are made to SDRT or CREST (other than changing the cancellation clauses in FA 1986 section 92 to reflect the ‘virtual’ stamping procedures in legislation) since SDRT is currently well understood by the capital markets and CREST operates smoothly.

3 Why do we need a review of the Stamp Taxes on Shares Framework? (Chapter 3)

- 3.1 We agree with the points made in Chapter 3 of the call for evidence as to why a review of the STS framework is necessary. The case for this was well made in the OTS report in July 2017. As noted above, we also agree that modernisation of the STS regime is a complicated project that will require several stages of consultation and new legislation.
- 3.2 We note that major legislative changes is not envisaged until Finance Bill 2021-22 at the earliest. We would agree with this and would caution HMRC to take the time needed to properly develop a new framework and allow time for full consultation on policy questions and practical options. There are many different populations which engage with the STS framework, including capital markets, listed companies, the mergers and acquisitions market and private companies and individuals. Each will have different interests and priorities. We hope that the government will not set any unnecessary deadlines with regards to timetable. In recent years we have seen that the rushed introduction of new complex regimes only results in amendments to legislation being required in future years (we refer, for example, to the hybrids and other mismatches rules and corporate interest restriction regime).
- 3.3 It must be recognised that, for taxpayers and advisers affected, the move from a documentary tax on share transfers not taking place on stock exchanges to a modern one will be disruptive and may take a while to

settle down. The disruption can be minimised by a longer, fuller consultation process, so that all who will be affected are brought along with the process as it develops to the greatest extent possible.

- 3.4 That said, as discussed in more detail at paragraphs 6.14 to 6.16 below, we think that the government should prioritise legislation to embed the COVID-19 related changes – for example to put notification by email on proper footing, make ‘virtual’ adjudication official and allow e-signed documents.

4 Chapter 4 – Prioritisation of stamp duty modernisation elements and amalgamation with SDRT

- 4.1 On balance, our view is that a modernised STS framework should be based on a single tax which applies to transfers of shares and securities which are in both dematerialised and materialised form. We recognise that there is likely to be some differences retained around, for example, administration to reflect the very different ways of trading private and listed shares, but, in principle, a single tax applying to both types of transfer of shares seems preferable.

- 4.2 A single tax would remove the complexities that can arise from the way in which the two taxes currently interact; complexities concerned with, for example:

- i) a purchaser’s obligation to pay SDRT if the payment of stamp duty is delayed;
- ii) the operation of the SDRT cancellation mechanic when a named purchaser under a share purchase agreement nominates a group company;
- iii) the need to create a letter of direction or other instrument of transfer in listed trades benefiting from reliefs not available under SDRT;
- iv) the different consideration rules under each tax; and
- v) the mis-match between ‘stock and marketable securities’ under stamp duty and ‘chargeable securities’ under SDRT.

- 4.3 The combined tax would share common principles across the listed and unlisted sector and should have a single definition of UK securities inside its scope, a single definition of consideration and one set of reliefs applying to all share transfers. We suggest that the new tax should have a scope of based on the current definition of ‘chargeable securities’ for SDRT purposes, with the reliefs imported from the current stamp duty regime. There are other aspects of the design of the new tax which will be more difficult to decide upon and will require further debate: for example, whether to use the stamp duty or SDRT meaning of consideration rules, whether the charge is on exchange or completion, how to deal with partnership interests/options, and many more. The 2017 OTS report and prior HMRC consultations (noted in the call for evidence) provide an excellent framework for that debate. Ultimately there will be policy decisions that have to be made and there may be ‘winners’ and ‘losers’ as a result. Some of these are discussed further below.

- 4.4 We consider it should be possible to have a combined tax which operates via CREST for listed securities and operates via an online filing system or portal for unlisted securities (self-assessment is discussed further in response to Chapter 6 below).

5 Chapter 5 – The scope of stamp duty and SDRT

- 5.1 We suggest that a newly designed regime should adopt SDRT’s current definition of chargeable securities and exclude shares in companies incorporated outside the UK. In particular, the current territorial scope of stamp

duty is cumbersome and out of date. We agree with the OTS's description in its 2017 report of stamp duty's broad territorial scope as giving rise to confusion, complication and additional costs. In a digital world, it is increasingly frustrating for business and their advisers to have to consider executing physical documents outside of the UK in order to mitigate a risk of a charge arising. Even if they do so, the uncertainty around the legislative term 'matter or thing done' in the UK remains. The territorial scope of SDRT is well understood by the capital markets and expanding the definition (by using the stamp duty concept) may risk destabilising the capital markets. Extending the scope of the new tax to foreign securities would also create unfairness since there is no double tax relief regime for stamp taxes.

- 5.2 We would also suggest that the wider scope of chargeable consideration for SDRT (compared with stamp duty) is adopted as being the more appropriate, modern definition of 'consideration'. However, it must be recognised that including 'money's worth' may impact some private share deals and bring transactions into tax for the first time; for example, transactions involving insurance policies, and there maybe others. Other areas that are anomalous and were mentioned in the responses to the OTS in 2017 (such as uncertain or contingent consideration, subsequently consulted upon by HMRC in 2018) will also have to be addressed.
- 5.3 More generally, it would be helpful if HMRC could be transparent as to the aims and expectations of this review with regard to tax neutrality. Is it expected that exactly the same things should be taxed? We suggest that there will necessarily be policy decisions around the extent to which the new regime should replicate the tax implications of the current regimes. If over-complication is to be avoided (for example, by defining some forms of consideration as non-chargeable, to reflect the current position under stamp duty), it must be recognised that modernisation of the regime and design choices will create winners and losers and this should be clearly communicated.

6 Chapter 6 – Reporting and Collection of stamp duty and SDRT (including reliefs)

- 6.1 The lack of self-assessment in the current stamp duty regime distinguishes stamp duty from all other UK taxes. We suggest that although we support a single tax for all transfers of shares, it should be possible to retain separate reporting and administrative systems. Thus, we suggest that for listed securities notification through the CREST system should be retained (since this works well and is well understood), but for unlisted securities and for listed securities that are not notified through CREST (such as over the counter transactions), a self-assessment system should be introduced.
- 6.2 In our view, the self-assessment regime should operate electronically, without having to submit paper documents. The advantages of self-assessment include:
- i) saving HMRC time, in assessing whether reliefs are due, calculating the liability and physically stamping the documents (however, please refer to our comments around clearances at paragraph [] below);
 - ii) reducing the risk of original documents going missing and reducing the environmental impact of paper documents;
 - iii) reducing the unwelcome delays which the call for evidence refers to, and the consequential impact on the UK as a favourable investment jurisdiction, particularly in the case of large and complex transactions (currently delays in updating title can have significant repercussions for banking covenants, for example); and

- iv) reducing the need for complicated and costly 'workarounds' employed solely to expedite the updating of title, including employing declarations of trust.
- 6.3 Taxpayers and tax professionals are familiar with the process of self-assessment and the principle that it is for the taxpayer and their adviser to determine the tax payable, based on an analysis of the transaction and how the relevant tax applies to it. Self-assessment works well under SDLT and we suggest the self-assessment procedure under SDLT could inform a re-designed STS regime.
- 6.4 A self-assessment system would also include appropriate time periods in which HMRC could open an enquiry, in a similar way to other taxes. This could be assisted by the design of the return, for example, by ensuring that there is sufficient 'white space', to encourage more detailed disclosure of facts and circumstances where appropriate, or allowing users to upload documents which may support the filing position taken. This could mitigate some of the difficulties that can arise under the SDLT regime, and should assist HMRC by ensuring taxpayers provide sufficient details, such that HMRC is satisfied that they do not need to open an enquiry, or better inform HMRC as to whether an enquiry should be opened.

Reliefs

- 6.5 As mentioned above, we suggest that all stamp duty reliefs (including group relief, reconstruction relief and acquisition relief, amongst others) should be applicable to all transfers of shares (whether affected by way of CREST or a paper transfer) under a new combined tax.
- 6.6 However, we would also like to suggest that this is an opportune time to give some consideration to the scope and policy intent of some of these reliefs and, in particular, the reliefs currently available in respect of stamp duty under FA 1986 sections 75 and 77. We would welcome a discussion with HMRC around the policy rationale of seeking to impose a stamp tax (currently, generally, stamp duty) charge on corporate reconstructions. There is generally relief from other taxes, such as capital gains tax and corporation tax, which ensure that the transactions are tax neutral. It can also be said that any tax charges that do arise on a corporate reconstruction are generally 'dry' tax charges, in that no cash is generated by the transaction. As such it is a real cost to a business or shareholder. Further, in circumstances where the corporate reconstruction takes place in order to facilitate a sale of the business, there should be a stamp duty or SDRT charge on the subsequent sale, and we would also expect that a new combined tax would apply to a subsequent sale.
- 6.7 In a modernised STS regime we would like to see a relief equivalent to the stamp duty relief at FA 1986 section 75 extended so that it applies to all transactions that are schemes of reconstruction for capital gains tax purposes (as defined by Taxation of Chargeable Gains Act 1992 Schedule 5AA), rather than the current more limited application to transactions that fall within the company law definition of reconstructions (determined by the judgment in *Re South African Supply and Cold Storage Ltd* [1904] 2Ch 268 to be a reconstruction which resulted in the substantially the same business being carried on by substantially the same persons). A broadening of this relief would allow relief from stamp taxes to be available for partition demergers, as well as for non-partition demergers, and would align the reliefs for stamp duty with the reliefs from capital gains tax and corporation tax. We cannot see any obvious policy reason for the current difference in tax treatment for different taxes, and wonder whether this is the result of stamp duty reliefs not keeping pace with changes to the rules applying to capital gains, rather than a considered policy outcome. The current situation means that some schemes of reconstruction cannot be carried out or have to be carried out in a different way, in order to obtain stamp duty relief or to otherwise mitigate the stamp duty liability.

- 6.8 We would also welcome some relaxation of the relief at FA 1986 section 77. This relief only applies if the shareholders of the acquiring company hold shares of the same classes and in the same proportions, or is nearly as possible in the same proportions, as their shareholdings in the target company. This means that the relief is quite restrictive and only applies to quite a narrow range of transactions. We suggest that this relief could reasonably be extended and still give effect to the policy intent of the relief. For example, it is not clear why the acquiring company has to have shares of the same classes as the target company; we suggest that a requirement for ordinary shares would be sufficient. Similarly, the exact 'mirror image' of shareholders is restrictive; we suggest that requiring a commonality of ownership (based on a significant percentage, but less than 100%) could be considered.
- 6.9 Another area that would benefit from reconsideration is the scope of the rule at FA 1986 section 77A FA. We recognise that this rule was introduced to counter perceived avoidance in this area, and we support that aim. However, notwithstanding the amendments to the rules that have been made since it was introduced, it still operates unfairly and arbitrarily in some circumstances, resulting in double taxation in relatively simple transactions where there is no avoidance motive; for example, stamp duty may be chargeable, depending on whether a purchaser has been identified before a pre-sale reorganisation takes place.
- 6.10 In conclusion, we suggest that one of the stages in this modernisation programme of the STS framework should include consultation on the scope and policy intent of the reliefs in respect of corporate reconstructions. We look forward to exploring these suggestions with you in more detail.
- 6.11 Under the current system of adjudication for stamp duty relief under FA 1986 sections 75 and 77, the Stamp Office confirms that the conditions required to be met for the relief are, indeed, satisfied and the relief is available. One of the statutory tests for the relief is that the transaction has been carried out for bona fide commercial reasons.
- 6.12 Under a new modernised system, based on a self-assessment reporting and collection regime, we would like to see a pre-transaction clearance facility for the availability of the reliefs equivalent to those under FA 1986 sections 75 and 77 (assuming the requirement for a commercial reason for the transaction remains). The vast majority of transactions where either relief is claimed will also be transactions where pre-transaction clearance has been granted from HMRC's BAI Clearance unit for capital gains tax and corporation tax purposes. The statutory test of the requirement for a commercial reason for the transaction is common to the capital gains tax, corporation tax and stamp duty reliefs.
- 6.13 On a practical level, we are aware that, when applying for and adjudication of the availability of relief under FA 1986 sections 75 or 77, the Stamp Office will rely to a large extent on the clearance that will already have been granted by BAI Clearances. On that basis, we envisage that the impact of a pre-transaction clearance facility for the application of reliefs equivalent to FA sections 75 and 77 under a new STS framework should be small: the Stamp Office would be asked to look at the transactions before they are carried out, rather than afterwards, with limited, if any, extra work required by officers of HMRC or extra resource or cost involved.

COVID-19 temporary changes

- 6.14 Our members' experience of the COVID-19 temporary changes to the processing of stock transfer forms and other instruments of transfer has been very positive. The process of sending scanned copies of transfer and supporting documents has been a faster and more efficient process than the traditional method of sending physical documents via post. Email notifications confirm receipt from HMRC immediately, which has mitigated our need to follow-up with HMRC to check receipt and, therefore, saved time and cost for

taxpayers. In addition, in some cases it has also helped avoid documents getting lost in the post on the way to or from HMRC. The turnaround time (from submitting the electronic stock transfer form to receiving the email from HMRC confirming the share register can be updated) has not been materially longer than under the traditional method and, in some cases, has been much shorter.

- 6.15 As a result of this success, we encourage HMRC to retain the temporary measures whilst this modernisation programme undertaken. We hope that this programme will result in a fully digitised system and it would be a shame to revert to the more cumbersome 'paper' methods in the meantime (or once the pandemic allows) now that these virtual 'work-arounds' have been developed and are working well.
- 6.16 We strongly recommend that HMRC legislate as soon as possible to formalise the 'virtual' stamp duty process adopted as a result of COVID-19. Doing so will address some of the concerns and unsatisfactory issues that have arisen with the 'virtual' stamping process. In particular, the process of HMRC providing a letter should be clarified to also provide 'adjudication' where the letter states that adjudication has been given (without the need for documents to be subsequently physically produced). It should also be made clear that electronic documents (which may or may not have been signed in wet ink) are able to benefit from 'virtual' stamping and relief under the adjudication process.

7 Chapter 7 – Enforcement and Payments

- 7.1 That payment of stamp duty is tied to registration of title of shares is considered in Chapter 6 of the call for evidence. Under the current stamp duty regime, the relationship between the stamp duty filing process and the updating of title can represent a significant administrative hurdle, particularly on corporate transactions involving multiple transfers of shares in quick succession or transactions where accelerated registration of title is required by banks, funders or other third parties for operational and commercial reasons. We suggest that under a modernised STS framework, operating on the basis of self-assessment, there should not be any requirement for registration of title to be tied to the payment of stamp duty.
- 7.2 We recognise that the de-coupling of payment of stamp duty from the registration of title removes an enforcement incentive in relation to the payment of stamp duty. It will be necessary, therefore, for a modernised STS framework to work on another basis to ensure compliance and suggest that under a self-assessment regime the purchaser should be the person liable for any tax due, with compliance obligations following that principle, and enforced in a similar way to other taxes (we would, however, retain the 'accountable person' concept for listed securities in CREST).

8 Chapter 8 – Moves towards Digitalisation

- 8.1 The digitalisation of stamp duty will bring the UK into line with most other jurisdictions and will send a clear modernisation message, which can only be positive in terms of the UK's international competitiveness. That stamp duty is such an outlier in relation to the UK's other taxes will also become increasingly problematic as the government continues to use and optimise technology for the benefit of HMRC and taxpayers (publishing in July its report 'Building A Trusted, Modern Tax Administration System').
- 8.2 With regard to digitalisation of stamp duty, we suggest a two stage process:

- Firstly, as soon as possible, legislate for the temporary measures employed for stamp duty as a result of COVID-19;
- Secondly, establish as a design feature of a combined STS framework a digitalised self-assessment system, to be developed and consulted upon as a medium to long term project, resulting in a combined STS framework with the same principles, if not the same procedures, applying across the unlisted and listed sector.

9 Chapter 9 – Stamp duty legislation

9.1 The end-goal should be a single Act (or part of the Finance Act) dedicated to Stamp Taxes on Shares. It would be helpful so far as possible if definitions used for stamp taxes could be consistent with definitions used in other taxes. Further consultations should inform decisions around changing definitions currently used for stamp duty purposes as a result of these being inconsistent, either between stamp duty and SDRT or with other taxes. As noted in the call for evidence, the consultation in November 2018 around the contingent consideration highlighted the difficulties of doing this in isolation of a fuller modernisation programme. Also, as noted above, wider reform of the STS framework will, inevitably, lead to policy decisions around design implications such as this. We suggest clarity and full transparency around the policy objectives and expected, intended outcomes to enable stakeholders to engage with the process and accept, if not embrace, any ‘losers’ alongside the ‘winners’. The resulting overall clarity and improvement to the STS framework should also compensate for any teething difficulties arising from inevitable changes to the existing regimes resulting from an amalgamation of the regimes of stamp duty and SDRT.

10 Acknowledgement of submission

10.1 We would be grateful if you could acknowledge safe receipt of this submission, and ensure that the Chartered Institute of Taxation is included in the List of Respondents when any outcome of the consultation is published.

11 The Chartered Institute of Taxation

11.1 The Chartered Institute of Taxation (CIOT) is the leading professional body in the United Kingdom concerned solely with taxation. The CIOT is an educational charity, promoting education and study of the administration and practice of taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. The CIOT’s work covers all aspects of taxation, including direct and indirect taxes and duties. Through our Low Incomes Tax Reform Group (LITRG), the CIOT has a particular focus on improving the tax system, including tax credits and benefits, for the unrepresented taxpayer.

The CIOT draws on our members’ experience in private practice, commerce and industry, government and academia to improve tax administration and propose and explain how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries. The CIOT’s comments and recommendations on tax issues are made in line with our charitable objectives: we are politically neutral in our work.

The CIOT's 19,000 members have the practising title of 'Chartered Tax Adviser' and the designatory letters 'CTA', to represent the leading tax qualification.

The Chartered Institute of Taxation

19 October 2020