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1. Introduction

- 1.1 This note provides guidance for use by members of the Chartered Institute of Taxation (CIOT) and the Association of Tax Technicians (ATT) to clarify the statutory requirements for a deed so that they may recognise such a document and be aware of the implications if HM Revenue and Customs (HMRC) propose using a deed in settling cases involving an individual taxpayer's liabilities to tax and interest.
- 1.2 We have shown this guidance to HMRC and agreed with them the description of the circumstances in which HMRC may suggest the need to use a deed rather than a standard contract, and why.
- 1.3 The guidance covers the rules applying in England and Wales. Members should take local advice on the differences applying in Scotland and Northern Ireland.
- 1.4 The guidance is based on the legislation applying as at 18 October 2017. While every care has been taken in the preparation of this guidance, the CIOT, the ATT, and all those involved in the preparation and approval of this guidance do not accept any responsibility for any loss occasioned by reliance on this guidance. This guidance is not a substitute for taking appropriate legal advice.

2. Summary of Advice

- 2.1 The guidance explains what constitutes a legally enforceable deed and that the drafting, preparation or execution of deeds is a 'reserved activity' under the Legal Services Act (LSA) 2007 ('the Act') which can only be carried out by an authorised person or an exempt person, as defined under the Act.
- 2.2 As such, members should be aware that the drafting, preparation, amending, inserting of any additional terms, execution and signing of a deed which relates to the settling of an individual's liabilities to tax and interest fall within the statutory definition of a reserved legal activity and should not be carried on by any member unless they are specifically authorised to do so or are exempt under the terms of the Act.
- 2.3 The guidance explains when a member will be authorised to carry out a reserved legal activity, or when they might be exempted under the terms of the Act. In general, members of the CIOT and ATT are not authorised to carry on a reserved legal activity unless they are also members of the Law Society or the Bar (but members should refer to paragraph 5 (below) for more detailed information on this aspect).
- 2.4 Members should be aware of the serious penal consequences that could ensue from carrying on such an activity when not entitled to do so (authorised or exempted).
- 2.5 If there is any doubt about whether a member is entitled to carry out certain work, the member should consider taking specialist legal advice on the matter.

3. What is a deed?

- 3.1 In simple terms, the statutory requirements of a deed are that it must be made in writing; it must specify that it is a deed on its face or that it is signed as a deed; and it must be signed and witnessed by the relevant parties.
- 3.2 According to Law of Property (Miscellaneous Provisions) Act 1989, section 1(2) any instrument entered into after 31 July 1990 shall be a deed if:
- a) it makes it clear on its face that it is intended to be a deed by the person making it or, as the case may be, by the parties to it (whether by describing itself as a deed or expressing itself to be executed or signed as a deed or otherwise); and
 - (b) it is validly executed as a deed by that person or, as the case may be, one or more of those parties.
- 3.3 Section 1(2A) provides that an instrument shall not be taken to make it clear on its face that it is intended to be a deed merely because it is executed 'under seal'.
- 3.4 Further, according to section 1(3) a 'validly executed' deed is an instrument that:
- a) is signed
 - (i) by the individual (on behalf of himself or another legal person) in the presence of a witness who attests the signature; or
 - (ii) at the individual's direction and in his presence and the presence of two witnesses who each attest the signature; and
 - (b) is delivered as a deed.
- 3.5 Members may in practice come across various forms of agreement provided by HMRC when they are advising clients on settling tax liabilities with HMRC. In direct tax matters enquiries may be concluded formally, or by contract settlement where amounts of tax, interest and penalties are agreed and it is administratively more convenient for both the taxpayer and HMRC. It is our understanding that in cases they want to settle in this way normally HMRC will use a contract settlement, not a deed. However, the CIOT and ATT are aware of some cases in which HMRC have proposed executing deeds rather than contracts when reaching settlements in respect of certain tax arrangements. The cases seen have tended to be mainly tax 'avoidance' cases such as those involving film partnerships, although it is understood that HMRC may have also used a deed in other cases involving complex multi-lateral elements, such as groups (of companies) and employee benefit trusts.
- 3.6 HMRC will typically use a deed where there may not be sufficient consideration to support a contract. To be an enforceable contract there needs to be an offer, an acceptance of the offer and valid consideration, as well as an intention to create legal relations. The consideration HMRC give in making a contract settlement is agreeing not to take formal proceedings (making assessments or amendments) in respect of the duties in the relevant statement in the contract for the specified period. HMRC retain the right to take proceedings for any other amounts that they may discover are due that are not covered by the contract. However, there may be cases where HMRC consider that they may be unable to provide consideration. For example, this could include some cases involving the settling of an individual partner's liabilities whilst the enquiry into the partnership itself remains open, if HMRC were unable to give the individual partner a guarantee to give up their right to take further proceedings against them. Therefore using a deed, which does not require consideration, is seen as a practical solution which gives the taxpayer legal protection from HMRC re-opening their individual case in the future.

- 3.7 Members should not expect HMRC to alert taxpayers and agents to the fact that the preparation of a deed is a reserved activity under the Act, although HMRC will often indicate if a deed is being used. It is reasonable to expect a deed to be entitled a 'Deed' although this is not conclusive. A deed must state that it is 'executed as a deed' or 'signed as a deed', or other words to that effect, and should contain (usually at the end) spaces for the signature of the representative of each party in addition to the name, address, occupation and signature of the person witnessing each signature.
- 3.8 In some cases it may not always be clear to members whether the documentation provided by HMRC is in the form of a legal deed, or whether it is simply a contractual agreement. Attached to this guidance is an example of a document that HMRC have used as a deed. Examples of standard letters of offer used in contract settlements for individuals, partnerships and companies are included in HMRC's Enquiry Manual at Appendix 1 (EMAPP1), published on GOV.UK.
- 3.9 If members are uncertain whether a document provided by HMRC is a deed or not then it is recommended that they seek legal advice.

4. Is the preparation of a deed a reserved legal activity?

- 4.1 LSA 2007 section 12 provides the definition of 'reserved legal activity' and this includes, so far as is relevant to the preparation of deeds, 'reserved instrument activities'.
- 4.2 In so far as relevant, LSA 2007 Schedule 2, paragraph 5 defines 'reserved instrument activities' as:
- (2) (c) **Preparing any other instrument** relating to real or **personal estate** for the purposes of the law of England and Wales or instrument relating to court proceedings in England and Wales.
 - (3) In this paragraph 'instrument' includes a contract for the sale or other disposition of land (except a contract to grant a short lease), but does not include:
 - (a) a will or other testamentary instrument,
 - (b) **an agreement not intended to be executed as a deed**, other than a contract that is included by virtue of the preceding provisions of this sub-paragraph,
 - (c) a letter or power of attorney, or
 - (d) a transfer of stock containing no trust or limitation of the transfer.
- 4.3 The wording of paragraph 5(3) above puts it beyond doubt that for the purposes of the Act, an agreement which is intended to be executed as a deed (and an agreement which makes it clear on its face that it is a deed) falls within the definition of an 'instrument'. One question that remains is whether or not preparing a settlement deed in tax cases amounts to preparing an instrument 'relating to...personal estate'.
- 4.4 The legal advice we have received is that it is more likely than not that the preparation of a deed settling an individual's liabilities to tax and interest (ie a payment of money) is an instrument related to personal estate, although there is uncertainty as to whether a deed which relates to the tax liabilities of a corporate body (and therefore does not relate to personal estate) will fall within the definition in paragraph 5(2)(c) of the Act outlined above.

- 4.5 Therefore, the preparation, drafting, amending, inserting of additional terms, execution and signing of a deed which relates to the settling of an individual's liabilities to tax and interest falls within the statutory definition of a reserved legal activity and should not be carried on by any member unless they are specifically authorised to do so or are exempt under the terms of the Act. 'Authorised' is defined in paragraph 5.3 below.
- 4.6 It is likely that simply providing advice as to the taxation consequences or implications of entering into a settlement by way of a deed which has been prepared by HMRC would be outside of a reserved legal activity and can be done by a non-legally qualified tax adviser as long as the adviser does not get involved in the drafting, amending, inserting of additional terms, execution and signing of any type of deed.
- 4.7 If we consider the example of a deed provided by HMRC to an individual partner in a film partnership. HMRC will have prepared and drafted the deed, and the tax adviser will typically advise their client on the accuracy of the content and whether it accords with what has been discussed and agreed with HMRC, including any tax calculation/settlement amount, penalties, and so on, and will advise the client on the consequences of signing the deed and how it will take effect. They will charge their client for this work. The tax adviser will not have been involved in the preparation of the document, but the tax adviser will want to discuss with HMRC whether any terms are not within their understanding of the settlement that has been agreed between HMRC and their client. Legal advice that we have received is that any advice as to the taxation consequences or implications of entering into a settlement by way of a deed would be outside of a 'reserved legal activity' and can be done by a non-legally qualified tax adviser. It would be inadvisable to insert any additional information or terms into a draft deed but negotiating with HMRC as to what the deed ought to cover (as opposed to its specific wording) would not be unlawful.

5. Entitlement to carry on a reserved legal activity

- 5.1 LSA 2007 section 13 provides that a person is entitled to carry on a reserved legal activity if the person is either authorised or exempt under the Act.
- 5.2 A person is 'authorised' to carry on a reserved legal activity if they are authorised by a relevant approved regulator.
- 5.3 LSA 2007 Schedule 4 sets out a list of Approved Regulators (representative bodies). The relevant approved regulators for these purposes are the Law Society, the Bar Council and the Institute of Chartered Accountants in England and Wales (ICAEW) (which is approved to regulate probate activities only). The Institute of Chartered Accountants of Scotland and the Association of Chartered Certified Accountants are also approved regulators for probate activities only but currently do not authorise anyone to offer this service. The CIOT and ATT are not approved regulators.
- 5.4 It follows that unless a person is a member of the Law Society or a member of the Bar, they are not authorised to carry on reserved instrument activities (which include the preparation of a deed).
- 5.5 Schedule 3 paragraph 3 of the Act lists the situations where a person is 'exempt' to carry on any activity which constitutes reserved instrument activities.

5.6 In so far as relevant to CIOT and ATT members, in terms of exempted persons, a person will be exempted for the purposes of reserved instrument activities in three instances:

1. If the person prepares the instruments or applications in the course of the person's duty as a public officer;
2. If they carry on the activity at the direction and under the supervision of an authorised person who is either an employer, manager or fellow employee. This means that a member could be exempted from needing authorisation if they are supervised and directed by an employer or colleague who is regulated (solicitor or barrister). An example would be a tax adviser or accountant working in-house at a law firm. In this example, the tax adviser could lawfully prepare a deed of settlement if they are instructed and supervised by one of the authorised lawyers in the firm; or
3. If they carry on the activity without the expectation of any fee, gain or reward.

6. Consequences of carrying on a reserved legal activity without entitlement

- 6.1 LSA 2007 section 14(1) makes it a criminal offence to carry on a reserved legal activity without entitlement (either authorisation or exemption). This is a strict liability offence. A statutory defence is for the accused to show that he did not know or could not reasonably have been expected to know that the offence was being committed.
- 6.2 Conviction for such an offence could lead to a fine (unlimited in indictment cases) or a prison sentence (up to two years in indictment cases) or both.
- 6.3 Carrying on a reserved legal activity without entitlement is a breach of the CIOT and ATT's Professional Rules and Practice Guidelines and a member is likely to face disciplinary action by the Taxation Disciplinary Board. Sanctions run from an admonishment through to expulsion.

The Chartered Institute of Taxation and Association of Taxation Technicians

THIS DEED is made this day of 2016 between:

1. THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS (the "Commissioners") of 100 Parliament Street, London SW1A 2BQ;

AND

2. [REDACTED] ("the Partner"), of [REDACTED], a partner in [REDACTED] [REDACTED] [REDACTED] [REDACTED] (together "the Partnerships").

(each a "Party" and, collectively, the "Parties").

WHEREAS:

- (A) The Partner is a partner in the Partnerships and has been invited to reach a settlement with the Commissioners.
- (B) In order to remove the continuing uncertainty in relation to the Partner's liabilities to Tax and interest and entitlement to losses or other relief for the Relevant Accounting Periods in respect of the Partnerships the Parties now wish to make this Deed.

In consideration of the mutual obligations contained in this Deed, it is agreed as follows:

1. Interpretation

1.1 In this Deed (including the recitals) unless otherwise specified:-

- (i) Reference to the singular shall include the plural and vice versa.
- (ii) Any reference to a partner shall include a member in a limited liability partnership.
- (iii) The expressions set out in Schedule 1 shall have the meanings that are set out in that Schedule.

2. Settlement

2.1 **The Parties agree that:-**

- (i) in respect of the accounting period ended 31/12/2009 the Partner's allowable losses in respect of the First Partnership shall be reduced to £
- (ii) in respect of the accounting period ended 31/12/2010 the Partner's allowable losses in respect of the Second Partnership shall be reduced to £

- (iii) in respect of the accounting period ended 31/12/2011 the Partner's allowable losses in respect of the Third Partnership shall be reduced to £
 - (iv) no losses shall be allowable to the Partner in respect of the Partnerships for any other Relevant Accounting Period.
 - (v) the Partner has no unused losses in respect of the Partnerships for the Relevant Accounting Periods.
- 2.2 The Parties agree that in consequence of the agreements at clauses 2.1(i) (ii) (iii) (iv) and (v) the Partner is liable to pay to the Commissioners Tax of £ and interest of £ in the total sum of £ ("the Settlement Sum") in accordance with the Agreed Calculation.
- 2.3 The Commissioners agree that subject to clause 2.4(c) the Partner has no further liability to Tax or interest in respect of the Partnerships for the Relevant Accounting Periods.
- 2.4 The Partner agrees:-
- (a) to pay the Settlement Sum in full in cleared funds on or before the Due Date without any set off whatsoever against any amount that is or may be due from the Commissioners to the Partner in relation to any period whatsoever;
 - (b) that the Settlement Sum cannot be reduced by any claim for, or by the use of, any losses, tax credits, or any other relief, credit or provision, and
 - (c) that, if the Settlement Sum has not been paid by the Due Date, interest at the rate which applies for section 87A TMA 1970, which may be varied from time to time, will also be payable on any unpaid balance as if it were an amount of unpaid income tax from the Due Date until the date of payment of the unpaid balance and such interest will be payable without deduction of tax and shall not be claimed or allowed as a deduction in computing any income, profits or losses for any tax purposes.
- 2.5 The Parties agree that any amendment, whenever made, under section 28B(4) TMA 1970 or 30B(2) TMA 1970 to the Partner's company tax return or returns under paragraph 3 of Schedule 18 to the FA 1998 for any of the Relevant Accounting Periods, shall be treated as having no effect on the Partner's liabilities to Tax or the amount of the Partner's losses or other relief in respect of the Partnerships.
- 2.6 The Parties agree that if following an appeal notified to the Tribunal amounts contained in a partnership statement for any Relevant Accounting Period are reduced or increased under s50 TMA 1970, then any notice given to the Partner under s 50(9) TMA 1970 giving effect to such reduction or increase shall be treated as having no effect for any period on the Partner's liabilities to Tax or the amount of Partner's losses or any other relief in respect of the Partnerships.

- 2.7 The Partner acknowledges that the agreement comprised in this Deed is without prejudice to the position of the Commissioners in relation to the Partnerships generally and does not constitute acceptance by the Commissioners that the Partnerships are trading or acceptance that relief is due to any other Partner.
- 2.8 The Partner agrees that nothing in this Deed shall have the effect of, or otherwise be construed as, a closure notice for the purposes of paragraph 32 of Schedule 18 to the FA 1998.
- 2.9 The Partner acknowledges that it may be subject to liabilities to Tax and interest in respect of the Partnerships for accounting periods other than the Relevant Accounting Periods.
- 2.10 The Partner undertakes not to:
- (A) seek to commence or re-open any settlement discussions with the Commissioners or HMRC in relation to the matters settled by this Deed;
 - (B) take any action with a view to resiling from this Deed;
 - (C) make a claim under Part VI of Schedule 18 to the FA 1998 for repayment or discharge of any amount that has been agreed under this Deed; or
 - (D) make a claim under common law or otherwise for repayment of any amount that has been agreed under this Deed.
- 2.11 If the Partner fails to comply with any obligation to pay any amount in respect of Tax due under this Deed or fails to comply with any of the Partner's obligations in clauses 2.2, 2.10 or 3.2 of this Deed, then the Commissioners may treat the Deed as repudiated. If the Commissioners treat this Deed as repudiated then this shall be without prejudice to any other rights, powers or remedies which the Commissioners or HMRC may have in respect of any such failure or breach. In particular, and without prejudice to the generality of the foregoing, if this Deed is treated as repudiated by the Commissioners then the Commissioners and/or HMRC may take such steps (including but not limited to the making of assessments and the opening, continuation and completion of enquiries) as may be necessary in order to determine or recover the Partner's liabilities to Tax and interest in respect of the Partnerships for the Relevant Accounting Periods.

3. Miscellaneous

- 3.1 This Deed may be executed in any number of counterparts and by the Parties in separate counterparts, but shall not be effective until each Party has executed at least one counterpart. Each counterpart shall constitute the original of this Deed, but the counterparts together shall constitute but one and the same instrument.

- 3.2 No Party will seek to resile from all or any part of this Deed because of a Change of Interpretation.
- 3.3 This Deed constitutes the entire agreement between the Parties in relation to the subject matter of this Deed.
- 3.4 The terms of this Deed shall be governed by and construed in accordance with English law. The courts of England and Wales shall have exclusive jurisdiction for all purposes relating to this Deed including any dispute arising out of or in connection with, or the carrying into effect of, this Deed and any dispute regarding the existence, validity or termination of this Deed or any non-contractual obligations arising out of or in connection with this Deed.

This Deed has been entered into as a deed and delivered on the date stated at the beginning of it.

SIGNED AS A DEED by [REDACTED])
[REDACTED] acting by)
[] a director,)
in the presence of:) *(signature of Director)*
)
) *Director*

Witness name:
(signature of witness)

Address:

Occupation of witness:

SIGNED as a DEED by)
[] an officer) *(signature of officer)*
of HMRC duly authorised and acting for)
and on behalf of The Commissioners for)
Her Majesty's Revenue and Customs in)
the presence of:)
)

Witness name:
(signature of witness)

Address:

Occupation of witness:

Schedule 1 – Interpretations

“the Agreed Calculation”	means the agreed calculation set out at Schedule 3;
“Change of Interpretation”	means a decision of a United Kingdom court or tribunal, or a change in interpretation (published or otherwise) by HMRC, in either case occurring after the date of this Deed;
“the Due Date”	means 30 calendar days after the date of this Deed;
“FA 1998”	means the Finance Act 1998
“HMRC”	has the meaning given in section 4 of the Commissioners for Revenue and Customs Act 2005 to the expression “Her Majesty’s Revenue and Customs”;
“the HMRC Settlement Opportunity”	means the settlement opportunity that was announced by HM Government on 3 December 2012 for some participants in certain schemes to settle their tax liabilities by agreement;
“the Relevant Accounting Periods”	means the accounting periods specified in Schedule 2;
“Tax”	means income tax and corporation tax;
“TMA 1970”	means the Taxes Management Act 1970.