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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