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Retrospective change of law announced for UK debt buybacks

Introduction

In a written Ministerial Statement (the Ministerial Statement), delivered on 27 February 2012, the UK Government has announced measures to counteract two tax avoidance schemes entered into by a UK bank (the Bank), the Bank being a signatory to the Code of Practice on Taxation for Banks.

Unusually, it has been announced in the Ministerial Statement that legislation in respect of one of the tax avoidance schemes will be retrospective to a date before the date of the Ministerial Statement itself. There is also a strong suggestion in the Ministerial Statement, that similar arrangements will be closed down retrospectively in future, specifically where (as has been the case with the Bank and the arrangements it entered into):

- the arrangements are contrived to avoid tax arising on the profits from certain debt buybacks; or
- the arrangements involve financial products designed to create tax credits that can be repaid or offset against a bank's other income and the tax in question has not been paid.

The Government's justification for the retrospective nature of the legislation in these circumstances is that the arrangements are 'wholly unacceptable, against the intentions of Parliament and the spirit of the law'.

The 'nuclear option' of changing UK tax legislation retrospectively will therefore be deployed, and has been threatened where similar future schemes are attempted. Given the importance of these developments, this article considers the circumstances leading to, and possible consequences of, the Government's action.

The UK taxation of indirect debt buybacks prior to 27 February 2012

The release of an obligation on a debtor to repay a debt generally results in the debtor being taxable on the amount released unless a statutory exemption applies. One such exemption applies where the debtor is connected, for the purposes of the loan relationships regime, with the creditor releasing the debt. Under the connected companies rules in the UK loan relationships regime, a creditor is prevented from bringing into account as a loan relationship debit any impairment or release of a debt owed to it by a connected debtor[1]. This general rule is subject to a number of exceptions and operates regardless of the accounting recognition of the impairment or release in the creditor's solus accounts[2]. Similarly, a debtor is not required to bring into account a loan relationship credit in respect of the impairment or release of a debt by a connected creditor[3]. This general position is also subject to a number of exceptions[4].

As a repurchase of debt by a debtor involves a release by operation of law, the same tax consequences might be thought to result from a debt buyback between connected companies as from a release of debt by a creditor connected to a debtor. However, since March 2005 the Government has introduced legislation to prevent connected companies achieving tax-free indirect releases of debt in certain circumstances. The transactions which have been targeted have, very broadly, involved the release of debt owed by a corporate debtor to an unconnected creditor by means of arranging for a company connected with the debtor to acquire the creditor's loan relationship or to acquire the unconnected creditor itself. Irrespective of the precise legislative language used by the parliamentary draftsman, the Government's policy objective in carefully limiting the scope of tax-free indirect debt buybacks to a specified set of tailored safe-harbours can, generally, be discerned.

Provisions introduced in Finance Act (FA) 2005[5] deemed there to be a release of all or part of a debt represented by a loan relationship in certain circumstances. These provisions, which became rewritten into Corporation Tax Act 2009 (CTA 2009) s361, provided that where a company (C2) acquired a loan relationship owed by a debtor company connected to C2 (D) from an unconnected third party (C), and the price paid by C2 was less than the carrying value in D's accounts, the loan relationship was deemed to have been released if either:

- the acquisition was not an arm's length transaction; or
- importantly, there was a connection between C2 and D in the period of three years beginning four years before the date of the acquisition of the loan relationship.

Other legislation in FA 2005, later rewritten into CTA 2009 s362, provided that where a company (X) was a creditor under a loan relationship owed by an unconnected company (Y) and X later became connected with Y, an amount equal to any impairment which would have been recognised by X had a period of account ended immediately prior to that connection arising was deemed to have been released.

The drafting of CTA 2009, s361 led to groups wishing to retire impaired debt to arrange for a newly formed connected company to acquire the debt at a discount on arm's length terms without a tax charge arising on a 'deemed release' owing to the age of the newly formed company falling outside the connection test. In the financial crisis of 2007–2009, many companies and financial institutions, seeking to consolidate balance sheets, improve return on equity or enhance covenant compliance, utilised the provisions of CTA 2009, s361 to achieve tax-free indirect debt buybacks.

Owing to the perceived circumnavigation of CTA 2009, s361, in particular where companies were establishing new companies to acquire group debt at a discount and avoid a taxable deemed release, the relevant legislation was amended in FA 2010. The Government expressly stated that its intention with these legislative changes was 'to ensure that only those debt buybacks that are undertaken as part of genuine corporate rescues will benefit from the buyback profits not being subject to tax'[6].

Accordingly, the circumstances under which a (potentially) taxable deemed release under CTA 2009, s361 could arise were widened considerably[7]. The connection test in CTA 2009 s361 was repealed and three new, significantly less generous, exceptions were introduced where:

- there has been a change in ownership in D, but for which it is reasonable to assume that D would have met an insolvency condition[8] within one year of the change of ownership, and the loan relationship was acquired on arm's length terms (it being reasonable to assume that the acquisition would not have taken place without the change in ownership) (the 'corporate rescue exception'). This assumption is particularly difficult to apply in practice owing to the inherent subjectivity (and therefore uncertainty) of the test of whether it is 'reasonable to assume' D would have met an insolvency condition;
- C2 acquires a loan or security in return for a new loan or security (respectively) with the same nominal value and substantially the same market value, on arm's length terms (the 'debt-for-debt exception'); or
- C2 acquires the loan relationship on arm's length terms in return for ordinary shares in C2, ordinary shares of a company connected to C2 or an entitlement to such shares (the 'debt-for-equity exception')[9].

Importantly, where a creditor had acquired a loan qualifying for the corporate rescue exception or debt-for-debt exception and where that debt was subsequently released, such a release was treated as a release of 'relevant rights'[10]. This required the debtor to bring into account a (taxable) credit equal to the discount received by the creditor on acquiring the loan, less the amount of any credits brought into account by the creditor with respect to that discount. This provision made it very difficult for bought-in debt to be released intra-group without a tax charge, which might result in such debt remaining outstanding. Paradoxically, the tax rationale for retaining such debt (on which the acquiring creditor would be taxed on the discount recognised) within a financially distressed group was perceived by many commentators to cut across the Government's stated policy desire to assist 'genuine corporate rescues' in the first place. The tax treatment of a release of 'relevant rights' in this way has severely limited the practical usefulness of the corporate rescue exception and debt-for-debt exception, thereby prompting increased attention by corporate groups, funds, individual shareholders in debt burdened companies and banks on restructuring debt outside the scope of the deemed release legislation in CTA 2009, ss361 and 362.

Written Ministerial Statement of 27 February 2012

From the information available in the Ministerial Statement and a supporting note published by HMRC[11] (the 'HMRC Note'), it appears that the 'scheme' undertaken by the Bank has attempted to circumvent CTA 2009, s361. HMRC's view is that the Bank has sought to 'frustrate the purpose of the deemed release rule'[12] in CTA 2009 s358(2) and the amendments to CTA 2009 s361 enacted in FA 2010.

It is notable that no background is given in either the Ministerial Statement or the HMRC Note as to the tax policy reasons for the changes made in FA 2005 or FA 2009 to ensure that indirect buybacks were allowed to be undertaken on a tax-free basis in only limited circumstances. Nor does the Ministerial Statement or HMRC Note describe the background to the Bank's transaction, besides identifying it as 'contrived'. Regardless of any opacity of the tax policy behind prior enactments on debt buybacks and the 'purpose of the deemed release rule' in CTA 2009 s358(2), it is clear that the Government views the circumvention of the deemed release rule by the Bank as highly offensive. It is also clear that the Government considers that the history of legislative changes and the 'clear statements' in the written Ministerial Statements of October 2009 and November 2009 serve as fair warning of their subsequent action.

The mischief of the scheme in the eyes of HMRC, apparently disclosed by the Bank under the Disclosure of Tax Avoidance Schemes regime[13], appears to arise from the ability of the debtor company group to acquire control of a creditor company after the creditor has already acquired the debt of the debtor company at a discount to the face value of the debt, but in circumstances that the creditor has not impaired the debt in its solus accounts. The deemed release rules would be avoided in such a situation. CTA 2009, s362 would not apply because the creditor company would not impair the debt at the time that it becomes connected with the debtor company[14]. CTA 2009, s361 is inapplicable because the debtor company's debt was not acquired by a connected creditor but, rather, the new creditor becomes connected with the debtor company after the debt has been purchased at a discount.

As no details are given by the Government regarding the background to the Bank's transaction it is difficult to comment on the commerciality (or otherwise) of what the Bank has done. However, it will concern many advisers and taxpayers that the features of the Bank's transaction are not far removed from other transactions undertaken by corporate groups, shareholders and funds in an attempt to mitigate an onerous tax charge arising under the deemed release legislation or release of relevant rights legislation on a debtor company in financially distressed circumstances.

Nevertheless, the Government has announced that the perceived avoidance will be countered by HMRC in three ways, which are expected to raise an extra £385m for the UK Exchequer and which will be included in Finance Bill 2012[15].

1. Introduction of a targeted anti-avoidance rule

With effect from 27 February 2012, a targeted anti-avoidance rule (TAAR) will apply where any part of the arrangements are entered into with a main purpose of avoiding or reducing an amount of a deemed release under CTA 2009, ss361 or 362[16]. In these circumstances, the amount is to be regarded as falling within CTA 2009, ss361 or 362 and any arrangements to avoid these provisions will be treated as having no effect. The deemed release charge that would have arisen in the absence of the arrangements will be imposed on the debtor company. The TAAR applies to arrangements entered into on or after 27 February 2012 but transitional rules also apply the TAAR to arrangements entered into prior to 27 February 2012 under which amounts are released or treated as released after that date (unless the release or deemed release occurs after that date as a result of an unconditional obligation in a contract made before 27 February 2012).

It is important to note that the TAAR will not only affect banks and is likely to constitute a serious problem for UK companies seeking to retire impaired debt in a manner which does not incur severe tax liabilities for the debtor group but which might fall outside of the narrow, arbitrary and (in the case of the corporate rescue exception) subjective parameters of the exceptions from the deemed release rules in CTA 2009, ss361 or 362. Inserting a TAAR to effectively prevent debt buybacks on a tax-efficient basis outside those exceptions (other than where the debtor company may have losses available to sterilise the resulting tax charge) is likely to cause difficulties in restructuring UK companies in a range of sectors far removed from the banking industry. The breadth of the TAAR, operative by reference to 'any part' of the arrangements, as opposed to the arrangements when viewed in the context of the overall transaction[17], is further likely to cause difficulties in financial restructurings in practice. In this regard it is important to note that the proposed TAAR is mechanical in operation. A commercially motivated transaction in which careful structuring is used to avoid a tax liability on a deemed release may well be caught.

Two technical problems might also arise from the new TAAR:

(a) First, it is unclear whether a court must identify which of CTA 2009, ss361 or 362 would otherwise have applied, but for the avoidance purpose. It may be that a court would be content to reach a finding that an amount should be treated as released regardless of whether it was possible to identify whether CTA 2009, ss361 or 362 applied – it being sufficient that one of those rules would otherwise have applied[18].

(b) Second, it is also not clear how arrangements entered into for the purpose of accessing the corporate rescue exception, debt-for-debt exception and the debt-for-equity exception will be treated. In these cases, it will undoubtedly be true that the main purpose of the overall arrangements will be to avoid a deemed release under CTA 2009, s361, although no carve-out from the TAAR is available (under the current drafting of the TAAR) for transactions seeking to access one of the exceptions. The HMRC Note is silent on this point. For example, it is therefore unclear how HMRC will treat debt for equity swaps under CTA 2009, s361C, which is, on its face, a mechanical legislative provision which affords little room for construing parliamentary intention. It may be difficult to tell the difference between a 'good' debt-for-equity exchange and a 'bad' one.

2. Changes to the amount of the deemed release when the creditor and debtor are connected

With effect from 27 February 2012, CTA 2009 s362 will be amended to tighten the calculation of the deemed release. Whereas before this amendment the creditor was deemed to release the amount of the debt which has and would have been impaired, the change will lead to the deemed release being the greater of that amount and the amount by which the pre-connection value of the debt in the debtor company's accounts exceeds the pre-connection value of that debt in the creditor's accounts. The intention appears to be to prevent circumvention of the deemed release rules where an unconnected creditor has not impaired the debt[19].

3. Retrospective change to the debt buyback rules

The more focused, and retrospective, change to the debt buyback legislation[20] appears intended to apply more specifically to the arrangements entered into by the Bank, but could have far wider consequences. An acquisition of debt will be treated as being made by a connected company at an undervalue (within the anti-avoidance provisions of CTA 2009, s361) if directly or indirectly as a result of or in connection with arrangements entered into by 'any party at any time':

(a) a company becomes a party to a loan relationship as creditor in the period from 1 December 2011 until 27 February 2012; and
(b) the creditor company subsequently becomes connected to the debtor company before 27 February 2012 directly or indirectly as a consequence of those arrangements.

It is of considerable concern that there is no relaxation in the retrospective legislation for non-bank corporates which may have effected debt buybacks since 1 December 2011 on a smaller scale than that undertaken by the Bank where such buybacks were structured to fall outside CTA 2009, ss361 or 362 as a consequence of routine tax planning.

The Code of Practice on Taxation for Banks

One aspect mentioned in the Ministerial Statement is that the Bank involved in the debt buyback scheme was a signatory to the Code of Practice on Taxation for Banks, introduced in 2010 (the Code)[21]. The written Ministerial Statement noted that 'the Government is clear that this is not a transaction that a bank that has adopted the Code should be undertaking'. The key themes of the Code relate to maintaining a transparent relationship with HMRC, adopting adequate governance to control the transactions entered into and not undertaking tax planning that seeks to achieve a tax result which is contrary to the intentions of Parliament. It is notable that the Ministerial Statement made no reference to the Bank's failure to implement the Code or act transparently. Indeed, the bank apparently complied with its obligations under the Disclosure of Tax Avoidance Schemes legislation, and it is possible that some banks may consider that such disclosures may serve to permit derogations from the Code as regards specific transactions undertaken. The focus of concern of the Government appears to be placed on the nature of the scheme undertaken by the Bank. In this, the Government clearly appears to have considered that the Bank had not complied with 'the spirit, as well as the letter, of tax law, discerning and following the intentions of Parliament'.

Any sanction for a bank in such a situation is likely to be dependent heavily on the context of the transaction which HMRC finds offensive. HMRC has stated that 'a bank which does not implement the code properly will not be considered as low risk', resulting in increased scrutiny of the bank's affairs[22]. It is possible for a bank to avoid being seen as being non-compliant with the Code where it has engaged in a 'common-sense dialogue' with HMRC[23]. However, the tone of the Ministerial Statement tends to indicates that, even if such dialogue has taken place, the resulting actions of the Bank are not in accordance with the Government's aim of modifying behavior through the code and thereby embedding a series of responses and attitudes within the UK banking sector which eschew tax avoidance.

Retrospective legislation

The announcement of the changes to the debt buyback rules is notable for the retrospective nature of the changes. The draft legislation inserting CTA 2009, s363A(8) is made retrospective in relation to debt acquisitions on or after 1 December 2011. The retrospectivity is announced openly by the Government, with the Ministerial Statement noting that '[t]his is not action that the Government is taking lightly'. The justification for the retrospectivity is that 'the potential tax loss from this scheme and the history of previous abuse in this area, means that the Government believes that this is a circumstance where action to change the legislation with full retrospective effect is justified to ensure that the system is fair for all and that those who seek to benefit from this aggressive avoidance do not get an unfair advantage'[24].

The Government's 'Protocol on unscheduled announcements of changes in tax law', introduced at the 2011 Budget (the 'Protocol'), recognised that changes to tax legislation where the change is effective from a date earlier than the date of announcement would be 'wholly exceptional' and would remain a viable response 'if their effect is solely to reduce tax liabilities'[25]. The Protocol does not provide any further guidance on the meaning of 'wholly exceptional'. Perhaps unsurprisingly, the Ministerial Statement confirmed that the Government viewed the avoidance counteracted by the changes to CTA 2009, s362 and introduction of CTA 2009, s363A as being 'wholly exceptional', echoing the phrasing used in the Protocol.

Retrospective tax legislation which has taken effect from a date before its announcement has been rare[26]. Aside from such situations, other retrospective tax legislation has been introduced but has generally fallen within the 'Black and Lord method', referred to as the 'Rees rules'[27], two of which govern legislation which is retrospective in the context of applying to the date a Government minster first announced the legislation in Parliament. The changes announced to the debt buyback legislation fall outside the Rees rules, although it is considered that any challenge to their retrospective nature is unlikely to be successful.

The recent decision of the Court of Appeal in *R (on the application of Huitson) v Revenue and Customs Commissioners*[28] has shown how difficult it can be for taxpayers to challenge the imposition of retrospective legislation. In *Huitson*, the Court of Appeal upheld the decision of the High Court that the enactment of FA 2008 s58(4) and (5), was not incompatible with art 1 of the

First Protocol to the European Convention on Human Rights. Mr Huitson had claimed that the retrospective nature of the legislation ran contrary to the right, under the First Protocol, of every natural or legal person to peaceful enjoyment of possessions. The test of whether art 1 of the First Protocol is breached is whether in securing the payment of taxes a national authority has struck a 'fair balance' between protecting an individual's fundamental rights (such as peaceful enjoyment of possessions) and the general interests of the community. In this, a state has a 'wide margin of appreciation' which the court would respect 'unless devoid of reasonable foundation'[29].

Where such a 'fair balance' has been struck, retrospective tax legislation is not prevented by the First Protocol[30]. The hurdle for a claimant alleging infringement of human rights in the context of taxation is set 'very high'[31]. Arrangements involving tax avoidance of an 'extremely artificial nature' that have no commercial purpose and serve merely to reduce or eliminate tax are particularly difficult to defend when faced with retrospective legislation against such avoidance[32].

The impact assessment relating to the changes in the debt buyback legislation noted that the measures are expected to increase tax revenue by £385m in the first year, with the Ministerial Statement noting that such measures, when coupled with other changes announced in the Ministerial Statement to the Alternative Investment Fund regime (the second of the proposed anti-avoidance measures noted in the introduction to this article), would 'protect further billions of tax from being lost'. However, it would be surprising if the quantum of taxation at stake would, by itself, be sufficient justification for retrospective legislation[33]. Nor would any breach of the Code alleged by HMRC appear to be sufficient when viewed in isolation. These factors may well constitute contributing factors behind the Government deciding to make the amending legislation retrospective, but seem unlikely by themselves to constitute the entirety of the justification by themselves.

Any question of whether the retrospectivity of the changes to the debt buyback rules could be challenged therefore rests on the proportionality and fairness of their introduction in the context of the threat to the Exchequer. Neither the current Coalition Government, nor the previous Labour Government, had made any general, overarching statements regarding the possibility of retrospective taxation on debt buybacks or regarding 'contrived' or unacceptable tax avoidance by the banking sector[34]. In this context, the Government has stated that, looking back to changes made in FA 2010, 'when closing these previous attempts by companies to profit from buying back their own debt without being taxed, the Government at the time made clear in two written Ministerial Statements that it expected such profits to be subject to corporation tax'[35]. HMRC's justification for retrospectivity in the proposed introduction of CTA 2009, s363A therefore appears, principally, to be the written Ministerial Statements made on 14 October and 9 November 2009 and the limitation of tax-free debt buybacks to 'genuine corporate rescues', a statement which was not expanded upon in either of the written Ministerial Statements. The expression might be construed purposively in the context of the legislative exceptions in CTA 2009, ss361A, 361B and 361C, although, as noted above, the exceptions are restrictive and provide narrow safe-harbours from a deemed release. The corporate rescue exception, perhaps being closest to the phrase 'genuine corporate rescues', is particularly difficult to apply owing to the subjectivity required in discerning whether the debtor company would have met one of the 'insolvency conditions' within an arbitrary time period.

Given the potential unattractiveness of the exceptions to the deemed release legislation, it is perhaps unsurprising that the Bank, and other corporate taxpayers, have sought to navigate around the provisions of CTA 2009, ss361 and 362. In the Bank's defence it might be said that the underlying transaction – repurchasing impaired issued debt with a view to, it is assumed, increasing return on equity and balance sheet improvement – has many of the hallmarks of a commercial transaction. In this regard, the Bank's transactional motives may have been the same as those of many corporates, whether such corporates carry on a banking trade or not. The utilisation of retrospective legislation against the Bank (and any other taxpayers implementing other similar arrangements on or after 1 December 2011) may not therefore be as fair or as proportionate as many media commentaries on the Ministerial Statement had suggested initially.

Regardless of such justifications, the Government clearly appears to consider that the manner in which the transaction was structured was offensive. It is unsurprising that the Ministerial Statement and supporting HMRC Note focus on the circumvention of the deemed release rules in CTA 2009, ss361 and 362 but without considering the practical difficulties arising from those rules and the inflexibility of the exceptions in CTA 2009, ss361A, 361B and 361C. It is also difficult to avoid the suspicion that a strongly worded criticism of the Bank's action in structuring the transaction, and the use of very visible retrospective legislation, may also serve a political purpose at a time when the UK banking sector is under some pressure both politically and throughout society generally.

Conclusion

Whatever the Government's reasoning, it is considered that the approach in seeking to introduce retrospective legislation such as CTA 2009, s363A(8) is a tool which can only be used rarely and with caution. Retrospective legislation is used at a price. It risks weakening the rule of law 'by reason of the uncertainty which it is bound to engender'[36]. If used regularly, retrospective legislation could lead to a case-by-case approach to targeting tax avoidance, damaging the perception of the UK as a stable and attractive business environment, whatever the corollary effects of recovering tax avoided[37]. While there is no suggestion currently that regular, repeated use of retrospective legislation is contemplated by the Government, and the approach of the Government appears to be that the proposal to introduce CTA 2009 s363A(8) will be 'wholly exceptional', the Ministerial Statement reserves the possibility of using retrospective legislation against future tax avoidance schemes. Should this transpire, some form of 'prospective retrospectivity' will be needed over and above the current protocol to develop clear rules for retrospective rule-making in order for all parties, Government and taxpayers, to be protected.

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Endnotes

1. CTA 2009, s354.
2. International Accounting Standard 39, paras 17(a), 18(a) and 25.
3. CTA 2009, s358.
4. CTA 2009, ss358(2) and 358(4).
5. Section 80, para 10 of Sched 4, FA 2005, enacted as para 4A of Sched 9, FA 1996.
6. Written Ministerial Statement of the Financial Secretary to the Treasury (Stephen Timms, MP), Hansard, Col 29W, 14 October 2009. A further written Ministerial Statement was made by the Financial Secretary to the Treasury on 9 November 2009 (Hansard, Col 2WS) proposing additional legislation ensuring that where the discount on an indirect debt buyback was not taxed, any subsequent release of that debt would be subject to taxation.
7. The legislation had effect from 14 October 2009 and 9 November 2009 depending on the particular provisions.
8. The insolvency conditions are set out in CTA 2009, ss322(c) and 323.
9. The three exceptions in CTA 2009, s361A, s361B and s361C have been repeatedly criticised for a number of additional reasons outside the scope of this article, despite their operation in practice being ameliorated in some areas by published HMRC guidance.
10. CTA 2009, s358(2)(b) and (4).
11. 'Loan relationships deemed releases and debt buybacks', Draft Legislation, Explanatory Note and Tax Information and Impact Note, dated 27 February 2012.
12. See para 14 of the HMRC Note.
13. Part 7, FA 2004.
14. In addition, the debtor and creditor would not be connected at the time the creditor company purchases the debt at a discount, resulting in the discount being ignored when it comes to calculating any pre-connection carrying value within CTA 2009, s362(1)(a) and not taken into account for the purposes of any deemed release.
15. HMRC has invited comments on the draft legislation by 12 March 2012.
16. To be inserted as new CTA 2009, s363A.
17. Included in the wording of the draft legislation for CTA 2009, s363A(1).
18. It is also concerning that although the new provision disapplies CTA 2009, s362 where the TAAR deems CTA 2009, s361 to apply (new CTA 2009, s363A(12)), that disapplication is not replicated where the TAAR deems CTA 2009, s362 to apply.
19. See also in this regard the change to the title of CTA 2009, s362 'as the new section no longer only applies to debts where the creditor's rights are subject to an impairment adjustment' (Draft explanatory note included in the HMRC Note, para 7).
20. To be inserted as CTA 2009, s363A(8).
21. 'A Code of Practice on Taxation for Banks' HMRC Consultation Document, 29 June 2009 and HMRC Consultation Response Document, 9 December 2009. See also the articles by the authors of this article in *Financial Instruments Tax and Accounting Review*, October 2009 and June 2010.
22. Supplementary Guidance Note to the Code, 9 December 2009, para 25.
23. Supplementary Guidance Note to the Code, 9 December 2009, para 26.
24. Ministerial Statement, p2.
25. 'Protocol on unscheduled announcements of changes in tax law' annexed to 'Tackling Tax Avoidance' published by HM Treasury in March 2011, p17, Box 4.A, '*In particular, changes to tax legislation where the change takes effect from a date earlier than the date of announcement will be wholly exceptional*'.
26. For example, s62 of FA 1987 (counteracting the arrangement to claim double tax relief held to be effective in *Padmore v IRC* (No 1) [1989] STC 493 (CA) and considered by the *High Court in Padmore v IRC* (No 2) [2001] STC 280 (Ch D)) and s58(4) and (5) FA 2008 (considered in R (on the application of Huitson), *Revenue and Customs Commissioners* [2011] STC 1860).
27. See statements by Peter Rees MP, 6 June 1978, Hansard, HC (Standing Committee A), cols 719-720, with additional statement by Joel Barnett MP, Hansard HC (Standing Committee A), cols 727-734.
28. *R (on the application of Huitson) v Revenue and Customs Commissioners* [2011] STC 1860. See also the judgment of the Court of Appeal on an application for judicial review of the retrospective application of s58 FA 2008 in *R (Mr Ian Issac Shiner) v HM Revenue & Customs* [2011] EWCA Civ 892, listed at the same time as Mr Huitson's appeal.
29. *National & Provincial Building Society v UK* (Application 21319/93) [1997] STC 1466.
30. Retrospectivity in a tax law context would not, however, extend to retrospective classification of breaches of tax laws as being criminal in nature. Extending the scope of existing criminal offences retrospectively to encompass acts which were previously not offences is impermissible under art 1 of the First Protocol to the European Convention on Human Rights as well as being in contravention of the implicit notion of the rule of law and lawfulness in art 1 of the First Protocol. For a recent consideration of this aspect of retrospective legislation, see the decision of the European Court of Human Rights on 20 September 2011 in *OAO Neftyanaya Kompaniya Yukos v Russia* (Application 14902/04), particularly paras 563 to 574.
31. *R (on the application of Federation of Tour Operators) v HM Treasury* [2007] EWHC 2062 (Admin) at para 154.
32. *A, B, C and D v UK* (Application 8531/79) (1981) 23 DR 203.

33. The second tax avoidance scheme involving the Bank and described in the Ministerial Statement has not been counteracted retrospectively, despite the fact that the expected tax loss appears to have been estimated to amount to at least £115m (HM Treasury Press Release dated 27 February 2012).
34. Contrast the written Ministerial Statement delivered by the UK Paymaster General on 2 December 2004 regarding tax avoidance in the financial and employment sectors (Hansard, 2 December 2004, cols 45–46WS).
35. Ministerial Statement, p1.
36. *A, B, C and D v UK* (Application 8531/79) (1981) 23 DR 203 at para 20.
37. 'Retrospectivity and the Rule of Law', Charles Sampford, (2006) Oxford University Press, chapters 3 and 6 passim.