These notes refer to the Finance Act 2012 (c.14) which received Royal Assent on 17 July 2012

FINANCE ACT 2012

EXPLANATORY NOTES

INTRODUCTION

Section 48Schedule 13: Employer Asset-Backed Pension Contributions Etc

Details of the Schedule

Part 1 – sections 196B to 196I and paragraphs 2-3

15. The new provisions in Part 1 follow the design of the structured finance legislation (see footnote 1) which applies where a person enters into a SFA. This is an arrangement where in accordance with generally accepted accounting practice, a person (the borrower) records in the borrower's accounts a financial liability in respect of a sum (the advance) paid by "the lender", and the advance will be repaid by an income stream.

16. In the case of ABC arrangements, the obligations of the employer and the registered pension scheme give rise to a situation similar to a SFA, where "the borrower" is the employer etc or an employer-related partnership or other relevant person, and the borrower receives money or another asset (the advance) from the pension scheme (the lender). The advance is wholly or partly funded out of the employer's contribution and the lender is entitled to a series of payments in respect of the borrower's asset (the security).

17. The main provisions (new sections 196B to 196D) will deny pensions tax relief (upfront relief) to the employer on the contribution paid using the ABC arrangement if the SFA rules do not apply. Instead deductions against the profits or income of the employer will be given in respect of each payment that the employer makes to the pension scheme (the lender) directly or indirectly under the income stream ("pay as you go" relief). Amounts of an income stream, which were previously taxable in the hands of the employer, are likely to cease to be taxable upon the transfer of the income stream to the lender or a connected person (the lender etc).

18. There are also revenue protection provisions (new sections 196F to 196H) –

    - an anti-avoidance provision (new section 196F) to prevent any employer from securing tax relief that exceeds the value made to the pension scheme; and

    - a separate set of provisions (new sections 196G and 196H) to recover relief given to an ABC arrangement that is an acceptable SFA when the financial liability is later reduced by an event other than the making of payments including an event where the employer ceases to be chargeable to tax or when a person is placed in a more advantageous tax position by the application of new section 196G.

19. However, in the examples of the events mentioned in the second bullet of the last paragraph, new sections 196G and 196H will only have effect when either event takes place on or after 21 March 2012. Otherwise these provisions will have effect on events that take place on or after 29 November 2011.

20. A series of new provisions – new sections 196E, 196I and 196J – provide for supplementary provisions and application. Paragraph 2 makes consequential changes and paragraph 3 makes provision for commencement of the new provisions.

The simple case – new section 196B

21. New section 196B deals with the simple case where the employer etc is the borrower and the lender is a person who acts for, or is otherwise connected with, the registered pension scheme. It stipulates in sub-section 1 the conditions under which relief under section 196 FA 2004 (upfront relief) will **not** be given to the employer (the borrower) in respect of a contribution paid under the ABC arrangement.

22. New sections 196B(2), (4) and (5) set out these conditions as follows:

- Condition A is that -
    - the borrower (employer etc) receives the advance which is wholly or partly paid or provided by the lender etc out of the contribution in respect of the arrangement;
    - the borrower or a person connected with the borrower (borrower etc) disposes of an asset (the security) to or for the benefit of the lender etc; and
    - the lender etc is entitled to payments in respect of the security.
- Condition B is that the arrangement is **not** a SFA as defined in new section 196J(4); and
- Condition C is that it is reasonable to suppose that the amount of one or more of the payments mentioned above is determined (wholly or partly) on the basis that, in essence, some part of the advance represents a loan (including any advance of money in accordance with new section 196B(7)(c)) which is to be repaid by the payment(s).

23. New section 196B(2) also makes it clear that those arrangements that fall within new section 196C(2) and 196D(2) do not fall within new section 196B(2).

24. New section 196B(3) states that condition A is met even if an entitlement of the lender etc is subject to any condition.

25. New section 196B(6) makes it clear that condition C is met even if repayments of the loan might be subject to any condition, or the accounts of any person do not record a financial liability in respect of the advance or is not otherwise treated as representing a loan for the purposes of the accounts of any person. However, this is subject to all the relevant circumstances being taken into account in order to get to the essence of the matter.

26. New section 196B(7)(a) ensures that references to a person connected with the borrower or lender do not include the lender or borrower respectively. This means that new section 196B cannot be triggered accidentally just because the borrower and lender are connected. New section 196B(7)(b) ensures that if the borrower is not the employer, the reference to a person connected to the borrower includes a person connected with the employer who would not otherwise be connected with the borrower.

The complex case – new sections 196C and 196D

27. New sections 196C and 196D deal with complex types of ABC arrangement involving a partnership receiving the advance, and changes in profit sharing arrangements in relation to the lender etc.

28. New section 196C will apply where, as part of the ABC arrangement which is used to make the contribution, the employer etc (the transferor) transfers an asset to a

partnership and is a member of that partnership immediately after the transfer (whether or not a member immediately before the transfer), and there is a relevant change in relation to the partnership as set out in new section 196E. In that circumstance, new section 196C(1) provides that the employer will **not** receive upfront tax relief under section 196 FA 2004 in respect of the contribution paid to the registered pension scheme when conditions A and B are met.

29. New sections 196C(2) and (5) set out these conditions as follows:

- Condition A is that -
  - the transferor is the employer etc;
  - the transferor or a person connected with the transferor (transferor etc) disposes of the security to a partnership and is a member of the partnership immediately after the disposal;
  - the partnership receives the advance, which is wholly or partly paid or provided out of the employer's contribution, from a person (the lender) other than the transferor;
  - there is a relevant change in relation to the partnership as set out in new section 196E; and
  - the share in the partnership's profits of the person involved in the relevant change is determined by reference to payments in respect of the security.
- Condition B is that the arrangement is **not** a SFA as defined in new section 196J(4).

30. New section 196C(3) ensures that where the transferor is not the employer, the reference to a person connected to the transferor includes a person connected with the employer who would not otherwise be connected with the transferor.

31. New section 196C(4) provides that condition A is met even if the determination of the share of partnership's profits is subject to any condition.

32. New section 196D will apply where the ABC arrangement which the employer uses to make the contribution to the pension scheme also involves a partnership receiving the advance but the security is held by a pre-existing partnership. As part of the ABC arrangement, the partnership receives an advance that is funded in some way by the employer's contribution. In that circumstance, new section 196D(1) provides that the employer will **not** receive upfront tax relief under section 196 FA 2004 in respect of the contribution paid to the registered pension scheme under the ABC arrangement when conditions A and B are met.

33. New sections 196D(2) and (4) set out these conditions as follows:

- Condition A is that -
  - a partnership holds the security at any time before the ABC arrangement is made;
  - the partnership receives the advance which is wholly or partly paid or provided by the lender out of the employer's contribution in respect of the arrangement;
  - there is a relevant change in relation to the partnership as set out in new section 196E; and
  - the share in the partnership's profits of the person involved in the relevant change is determined by reference to payments in respect of the security.
- Condition B is that the arrangement is **not** a SFA as defined in new section 196J(4).

34. New section 196D(3) provides that condition A is met even if the determination of the share of partnership's profits is subject to any condition.

35. New section 196E provides that a relevant change in relation to the partnership occurs (which in turn enables the conditions in new sections 196C and 196D to be met) if one of the conditions - condition X or condition Y - is met. New sections 196E(2) and (3) set out these conditions as follows:

- Condition X is that the lender etc joins the partnership in connection with the ABC arrangement at any time; or
- Condition Y is that there is a change in the lender etc's share of the partnership's profits in connection with the ABC arrangement.

36. References used in this new section and in new sections 196C and 196D are explained in new sections 196E(4) and (5).

Anti-avoidance – new section 196F

37. New section 196F is an anti-avoidance provision to deny upfront relief or recover any relief already given when the employer etc sets up an arrangement (the avoidance arrangement) mainly for the purpose of securing tax relief that will exceed the amount the employer should receive relative to the total amount of payments the employer will make to the pension scheme under the ABC arrangement. This provision will only apply to ABC arrangements where the contribution is paid between 29 November 2011 and 21 February 2012 and its effect continues after 21 February.

38. New section 196F(1) provides that this new provision applies where the employer etc enters into an avoidance arrangement and where upfront relief for the ABC arrangement is not denied under new sections 196B, 196C, or 196D because the arrangement is a SFA.

39. New section 196F(2) provides that where the avoidance arrangement is entered into at or before the time when the advance referred to in new sections 196B, 196C or 196D is received, upfront relief is denied on the contribution paid under the ABC arrangement by deeming that Condition B in one of those sections is met.

40. New section 196F(3) provides that where the avoidance arrangement is entered into after the advance is received, then the amount of the relevant financial liability at the time the avoidance arrangement is entered into is treated as profit or income that is charged to the employer for the period in which that time falls.

41. New section 196F(4) sets out that the amount treated as profit or income is not to exceed the total amount of relief given to the employer in respect of the ABC arrangement. The terms used in this new section are defined in new section 196F(5).

Relief recovery for a financial liability reduction by an event other than the making of payments – new sections 196G and 196H

42. New section 196G is a new provision to recover upfront relief given to an ABC arrangement (including a pre-November arrangement) that is an acceptable SFA when the financial liability is later reduced by an event other than the making of payments. This provision applies to this type of ABC arrangement where the contribution is paid at any time before 21 February 2012 but in the case of those arrangements with contributions paid before 29 November 2011, it only applies where the event occurs on or after 29 November 2011. There are two exceptions to these commencement provisions and they concern new section 196G(3) and new section 196H (which is an extension of new section 196G) - see details in paragraphs 45, and 48 to 50 below.

43. New section 196G(1) provides that the section applies where the ABC arrangement is an acceptable SFA, and an event, other than the making of payments to the pension

scheme, occurs which results in the advance (or part of it) no longer being recorded as a financial liability in the employer's (or partnership's) accounts.

44. If the financial liability is reduced to nil, the ABC arrangement will cease to be a SFA under new section 196G(2).

45. New section 196G(3) cancels the effect of the application of new section 196G if a person is to be placed in a tax position which is more advantageous than the tax position in which the person would have been had new section 196G never applied. This subsection will have effect from 21 March 2012.

46. New section 196G(4) provides that the amount of the reduction in the relevant financial liability immediately before this event will be treated as profit or income chargeable on the employer in the period in which the event occurs.

47. New section 196G(5) provides that the amount treated as profit or income under new sub-section 4 cannot exceed the total amount of relief already given to the employer in respect of the arrangement. The terms used in new section 196G are defined under new section 196G(6).

48. New section 196H is an extension of new section 196G as set out in new section 196H(1).

49. New section 196H provides in new subsections (2) and (3) that the financial liability is treated as being reduced to nil in the relevant period of accounts[1] when the employer who has an ABC arrangement where the contribution was paid between 29 November 2011 and 21 February 2012, ceases to be chargeable to tax on or after 21 March 2012.

50. New sections 196H(4) and (5) set out the circumstances under which such cessation takes place. There are different circumstances depending on whether the employer's business is a company, a limited liability or other type of partnership. These circumstances also include cases where the employer company goes into administration or winds up, or the employer partnership dissolves or when an individual who is the employer dies.

Treatment of advances that fall within the SFA rules – new section 196I

51. New section 196I provides that any advance made before 22 February 2012 under an ABC arrangement that is a SFA and that gives rise to a loan within the meaning of Chapter 3 of FA 2004 is not prevented from meeting the definition of a scheme administration employer payment in S180 FA 2004 regardless of whether the advance also meets the definition of a loan for the purposes of FA 2004. This means that no unauthorised payment charge will arise under section 208 FA 2004 purely by virtue of the fact that the advance gives rise to a loan which is not capable of meeting the conditions of section 179 FA 2004.

Supplementary provisions and application – new section 196J and paragraph 2

52. New section 196J provides a number of definitions and other supplementary provisions for new sections 196B to 196I.

53. New section 196J(2) explains the references to relief being given in respect of a contribution paid by an employer under a registered pension scheme.

54. New section 196J(3) refers to the meaning of connected persons in section 1122 Corporation Tax Act (CTA) 2010.

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1 The relevant period of accounts is either (a) the relevant accounting period if the employer etc is a company or (b) the relevant tax year if the employer etc is an unincorporated business.

55. New section 196J(4) explains the references to a SFA are to the definition of a type 1, type 2 or type 3 arrangement under Part 13 of the Income Tax Act (ITA) 2007 (for income tax purposes) or Part 16 of CTA 2010 (for corporation tax purposes).

56. New section 196J(5) provides that sections 774 (accounts), 775 (arrangements) and 776 (assets) of CTA 2010 apply to new sections 196B to 196I in the same way as they do for the purposes of Part 16 of CTA 2010.

57. Paragraph 2 make a consequential amendment to section 280(1) FA 2004 (abbreviations) by inserting a reference to CTA 2010.

Commencement and application of new sections 196B to 196J – paragraph 3

58. Paragraphs 3(1) and (2) provide that the amendments made by new sections 196B to 196J shall have effect for contributions paid by employers between 29 November 2011 and 21 February 2012.

59. Paragraph 3(3) provides that new section 196G also has effect for contributions paid before 29 November 2011 where the relevant event as described in new section 196G(1)(d) occurs on or after 29 November 2011. Where this paragraph applies, new sections 196B to 196D also have effect for the purpose of applying new section 196G.

60. Paragraph 3(4) provides that new section 196G(3) only has effect on an event as set out in that section when it takes place on or after 21 March 2012.

61. Paragraphs 3(5) and (6) respectively provide that new sections 196H and 196I also have effect for contributions paid before 29 November 2011 and assumes that new sections 196B to 196D have effect in relation to these contributions for the purposes of applying new sections 196H and 196I.