

## **MEMORANDUM OF UNDERSTANDING (“MOU”)**

### **BETWEEN THE COMPETENT AUTHORITIES OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE STATES OF GUERNSEY**

### **CONCERNING ARBITRATION UNDER ARTICLE 25 OF THE 2018 AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE STATES OF GUERNSEY FOR THE ELIMINATION OF DOUBLE TAXATION WITH RESPECT TO TAXES ON INCOME AND ON CAPITAL GAINS AND THE PREVENTION OF TAX EVASION AND AVOIDANCE (“THE AGREEMENT”)**

The competent authorities of the United Kingdom and of Guernsey (hereinafter referred to as the “Territories”) hereby enter into the following mutual arrangements (hereinafter referred to as the “Arrangements”) to establish the mode of application of the arbitration process provided for in Article 25 of the Agreement, which entered into effect on 7 January 2019. The competent authorities may modify or supplement these Arrangements by joint decision in writing.

#### **Part 1. Request for submission of case to arbitration**

1.1 A request that unresolved issues arising from a mutual agreement case be submitted to arbitration pursuant to paragraph 5 of Article 25 of the Agreement (hereinafter referred to as the “request for arbitration”) must be made in writing and sent to one or both of the competent authorities. The request must contain sufficient information to identify the case. The request must also be accompanied by a written statement by each of the persons who either made the request or is directly affected by the case that no decision on the same issues has already been rendered by a court or administrative tribunal of the Territories. Within 10 days after the receipt of the request, the competent authority who received it without any indication that it was also sent to the other competent authority will send a copy of that request and the accompanying statements to the other competent authority.

#### **Part 2. Minimum information necessary to allow substantive consideration of the case**

2.1 The minimum information to be supplied with a request for arbitration is as follows:

- a) **Identity of the person(s) covered in the request for a mutual agreement procedure** – the name, address, taxpayer identification number (if any) and/or birth date of the person who presented the case (hereinafter referred to as the “taxpayer”), contact details and the relationship(s) between the taxpayer and other persons covered in the request for a mutual agreement procedure.
- b) **The basis for the request** – the specific provision(s) of the Agreement which the taxpayer considers is not being correctly applied by either one or both of the Territories (indicating which Territory, the regional or local tax administration office that has made, or is proposing to make, the adjustment (if relevant), and contact information for the relevant person(s) in that Territory responsible for the adjustment).
- c) **Facts of the case** – a summary of all relevant facts of the case, including documentation to support these facts, the taxation year(s) or period(s) involved and the related amounts (in all relevant currencies and supported by calculations, if applicable).
- d) **Analysis of the issue(s) to be resolved through the mutual agreement procedure** – an analysis of the issues with respect to which a mutual agreement procedure is requested, including the taxpayer’s interpretation of the application of the relevant provision(s) of the Agreement, to support the taxpayer’s basis for its claim that those provision(s) have not been correctly applied by either one or both of the Territories. The taxpayer’s analysis should be supported with relevant documentation, which may include, but is not limited to –
- transfer pricing documentation required by domestic legislation or other published guidance in the taxpayer’s Territory of residence;
  - copies of tax assessments and audit or other tax administration documentation and correspondence reflecting what the taxpayer considers to be the incorrect application of the relevant provision(s) of the Agreement; and

- copies of briefs, objections, etc., submitted by the taxpayer in response to the action or proposed action of a tax administration of the Territories.

The competent authorities will endeavour to minimize administrative and other burdens related to the analysis of the issue(s) to be resolved through the mutual agreement procedure, in particular for individuals and small taxpayers. The competent authorities will accordingly evaluate the completeness of the taxpayer's analysis taking into account the amount(s) of tax at stake, the sophistication of the taxpayer, and whether a tax professional is representing the taxpayer in connection with its request for competent authority assistance. Even if a competent authority initially decides to accept an abbreviated analysis of the issue(s) to be resolved through the mutual agreement procedure, that competent authority may subsequently require the taxpayer to supplement its analysis with additional information or documents.

- e) **Whether the request for a mutual agreement procedure was also submitted to the competent authority of the other Territory** – a copy of any other relevant mutual agreement procedure request(s) and associated documents filed, or to be filed, with the competent authority of the other Territory, including copies of correspondence from the other tax administration. The taxpayer should indicate the date of any such submission and the person or the office to which the request was submitted.
- f) **Whether the request for a mutual agreement procedure was also submitted to another authority under another instrument that provides for a mechanism to resolve Double Taxation Agreement (“DTA”) -related disputes** – a copy of any other request for a mutual agreement procedure under another instrument that provides for a mechanism to resolve DTA-related disputes (including all documentation filed with that submission). The taxpayer should indicate the date of any such submission and the person or the office to which the request was submitted.

- g) **Whether the issues involved were previously dealt with** – the request should state whether the request for a mutual agreement procedure involves issues that are currently being considered or were previously considered:
- by the tax authorities of either Territory as part of an advance ruling, advance pricing arrangement, settlement agreement or similar proceedings;
  - as part of any other administrative proceedings; or
  - by any tax tribunal or court.

Copies of any relevant rulings, agreements or decisions should be provided.

- h) **Any other specific additional information requested** by the competent authority of a Territory after the receipt of the request for a mutual agreement procedure.

### **Part 3. Terms of Reference**

3.1. Within 60 days after the request for arbitration (or a copy thereof) has been received by both competent authorities, the competent authorities will jointly determine the questions to be resolved by the arbitration panel and communicate them in writing to the person who made the request for arbitration. This will constitute the “Terms of Reference” for the case. Notwithstanding the following provisions of these Arrangements, the competent authorities may also, in the Terms of Reference, provide procedural rules that are additional to, or different from, those included in these provisions and deal with such other matters as are deemed appropriate for the purposes of conducting these proceedings.

3.2 If the Terms of Reference have not been communicated to the person who made the request for arbitration within the period referred to in paragraph 1 above, that person and each competent authority may, within 30 days after the end of that period, communicate in writing to each other a list of issues to be resolved by the arbitration. All the lists so communicated during that period will constitute the tentative Terms of Reference. Within 30 days after all the arbitrators have been appointed as provided in the following paragraphs of these Arrangements, the Chair will communicate to the competent authorities and the person who made the request for arbitration a revised version of the tentative Terms

of Reference based on the lists so communicated. Within 30 days after the revised version has been received by both of them, the competent authorities may jointly determine different Terms of Reference and to communicate them in writing to the arbitrators and the person who made the request for arbitration. If they do so within that period, these different Terms of Reference will constitute the Terms of Reference for the case. If no different Terms of Reference have been jointly determined by the competent authorities and communicated in writing within that period, the revised version of the tentative Terms of Reference prepared by the arbitrators will constitute the Terms of Reference for the case.

#### **Part 4.           Appointment of arbitrators**

4.1.    The competent authorities of the Territories have jointly determined that the following rules will govern the appointment of the members of an arbitration panel:

- a)       Each competent authority will appoint one panel member within 90 days of the date of the request for arbitration under Article 25 of the Agreement. The two members so appointed will, within 60 days of the latter of their appointments, appoint a third member who will serve as the Chair of the arbitration panel. The arbitrators will choose the Chair from the list that has been jointly determined by the competent authorities pursuant to paragraph 4.5.
  
- b)       In the event that the competent authority of a Territory fails to appoint a member of the arbitration panel within the time period specified in subparagraph a), a member will be appointed on behalf of that competent authority by the highest ranking official of the Centre for Tax Policy and Administration of the Organisation for Economic Co-operation and Development who is not a person holding British nationality. The relevant appointment will be made within 60 days after receiving a request to that effect from the person who made the request for arbitration. In these circumstances, the member of the arbitration panel will be appointed from the list, identified pursuant to paragraph 4.6, that has been provided by the competent authority that fails to appoint a panel member. In the event that no list has been provided pursuant to paragraph 4.6 or none of the persons identified in the list are available, a member will be appointed on behalf of that competent authority by and at the discretion of the highest ranking official of the Centre for Tax Policy and Administration of the

Organisation for Economic Co-operation and Development who is not a person holding British nationality.

- c) If the two initial members of the arbitration panel fail to appoint the Chair within the time period specified in subparagraph a), the Chair will be appointed by the highest ranking official of the Centre for Tax Policy and Administration of the Organisation for Economic Co-operation and Development who is not a person holding British nationality. The relevant appointment will be made within 60 days after receiving a request to that effect from the person who made the request for arbitration. In these circumstances, the Chair of the arbitration panel will be appointed from the list that has been jointly determined by the competent authorities pursuant to paragraph 4.5. In the event that no list has been provided pursuant to paragraph 4.5 or none of the persons identified in the list are available, a person who does not hold British nationality will be appointed as Chair by and at the discretion of the highest ranking official of the Centre for Tax Policy and Administration of the Organisation for Economic Co-operation and Development who is not a person holding British nationality.

4.2. Except to the extent that the competent authorities jointly decide on different rules, the procedures provided for in Part 4 of these Arrangements will apply with the necessary adaptations if for any reason it is necessary to replace an arbitrator after the arbitration process has begun. In such circumstances, the competent authorities will also jointly decide on necessary adaptations, as appropriate, to the deadlines provided in Part 5 of these Arrangements.

4.3. An arbitrator will be considered to have been appointed when a letter confirming that appointment and signed by both the arbitrator and the person or persons who have the power to appoint that arbitrator has been communicated to both competent authorities.

4.4. The competent authorities will appoint arbitrators who have expertise or experience in international tax matters. They need not, however, have experience as either a judge or arbitrator. Each arbitrator appointed to the arbitration panel must be impartial and independent of the competent authorities, tax administrations, and ministries of finance or bodies performing equivalent functions (which in the case of Guernsey includes relevant

government committees) of the Territories and of all persons directly affected by the case (as well as their advisors and any related persons) at the time of accepting an appointment, maintain his or her impartiality and independence throughout the proceedings, and avoid any conduct for 12 months after the date the panel delivers its decision under paragraph 5.6 or subparagraph 5.7(g), as the case may be, or any other period jointly determined by the competent authorities, which may damage the appearance of impartiality and independence of the arbitrators with respect to the proceedings. Each arbitrator appointed to the arbitration panel will execute a written certification to this effect. The arbitrators will promptly disclose to both competent authorities, in writing, any new facts or circumstances that arise during or following the arbitration proceedings that might give rise to doubts with respect to their impartiality or independence.

4.5. The competent authorities will jointly determine a list of at least 6 persons who are qualified and willing to serve as the Chair of an arbitration panel. The competent authorities will review and revise this list as necessary. The persons to be identified for purposes of this list will meet the requirements of paragraph 4.4.

4.6 Each competent authority will identify a list of at least 6 persons who are qualified and willing to serve as members of the arbitration panel. Each competent authority will review and revise its list as necessary and provide a copy of the list, and any revisions, to the other competent authority. The persons to be identified for purposes of these lists will meet the requirements of paragraph 4.4.

## **Part 5. Arbitration process**

### ***Final offer***

5.1. Within 90 days after the appointment of the Chair of the arbitration panel (unless, before the end of that period, the competent authorities jointly decide on a different period or jointly decide to use the approach described in paragraph 5.7 with respect to the relevant case), the competent authority of each Territory will submit to the Chair of the arbitration panel a proposed resolution which addresses all unresolved issue(s) in the case (taking into account all agreements previously reached in that case between the competent authorities). The Chair will forward the proposed resolutions to the other members of the arbitration panel and the other competent authority only after receipt of both proposed resolutions or after the 90 day period has expired, whichever is the earlier. The proposed resolution will be limited to a disposition of specific monetary amounts (for example, of income or expense) or, where specified, the maximum rate of tax that may be charged

pursuant to the provisions of the Agreement, for each adjustment or similar issue in the case. In a case in which the competent authorities of the Territories have been unable to reach agreement on an issue regarding the conditions for application of a provision of the Agreement (hereinafter referred to as a “threshold question”), such as whether an individual is a resident or whether a permanent establishment exists, the competent authorities may submit alternative proposed resolutions with respect to issues the determination of which is contingent on resolution of such threshold questions.

5.2. The competent authority of each Territory may also submit a supporting position paper for consideration by the arbitrators. Any such supporting position paper will be submitted to the Chair of the arbitration panel within the period of time provided for in paragraph 5.1. The Chair will forward the supporting position papers to the other members of the arbitration panel and the other competent authority only after receipt of both supporting position papers or after the period of time provided for in paragraph 5.1 has expired, whichever is the earlier.

5.3. In the event that the competent authority of one Territory fails to submit a proposed resolution within the period of time provided for in paragraph 5.1, the arbitration panel will select as its decision the proposed resolution submitted by the other competent authority.

5.4. Each competent authority may also submit a reply submission with respect to the proposed resolution and supporting position paper submitted by the other competent authority. Any such reply submission will be submitted to the Chair of the arbitration panel within 150 days after the appointment of the Chair of the arbitration panel. The Chair will forward the reply submissions to the other members of the arbitration panel and the other competent authority only after receipt of both reply submissions or after the 150-day period has expired, whichever is the earlier.

5.5 Unless the competent authorities jointly decide otherwise, the arbitrators will use tele- and videoconferencing for the purposes of any meetings between themselves and with both competent authorities.

5.6 The arbitration panel will select as its decision one of the proposed resolutions for the case submitted by the competent authorities with respect to each issue and any threshold questions, and will not include a rationale or any other explanation of the decision. The arbitration decision will be adopted by a simple majority of the arbitrators. The arbitration decision will be delivered to the competent authorities of the Territories in writing



within 90 days after the reception by the arbitrators of the last reply submission or, if no reply submission has been submitted, within 180 days after the appointment of the Chair of the arbitration panel. The arbitration decision will have no precedential value.

### ***Independent opinion***

- 5.7. (a) If, within 60 days after the appointment of the Chair of the arbitration panel, the competent authorities jointly decide to use the approach described in this paragraph with respect to a given case, each competent authority will provide to the arbitration panel and to the other competent authority, within 120 days after that joint decision, any information that it considers necessary for the panel to reach its decision. That information should include a description of the facts and of the unresolved issues to be decided together with the position of the competent authority concerning these issues and the arguments supporting that position. Unless the competent authorities jointly decide otherwise, the arbitration panel may not take into account any information that was not available to both competent authorities before both competent authorities received the request for arbitration (or a copy thereof).
- (b) In the event that the competent authority of one Territory fails to submit the information described in subparagraph a) within the period of time provided for in that subparagraph, the arbitration panel will select as its decision the position submitted by the other competent authority.
- (c) The competent authority who received the written request for arbitration will notify the person who made the request for arbitration of the joint competent authority decision to use the approach described in this paragraph within 10 days of such a decision (if the written request for arbitration indicates that it was also sent to the other competent authority, such notification will be provided by the competent authority of the Territory of residence of the person who made the request for arbitration). The person who made the request for arbitration may, either directly or through his representatives, present their position to the arbitrators in writing to the same extent that he can do so during the mutual agreement procedure. In addition, if the

competent authorities and arbitrators all approve, the person may present their position orally during the arbitration proceedings. Any written materials prepared by the person who made the request for arbitration or his representatives will be submitted to the arbitrators by the competent authorities. Such materials will only be presented to the arbitrators if they are provided to both competent authorities within 120 days after the notification referred to in the first sentence of this subparagraph.

- (d) Within 30 days after the Chair has informed the competent authorities that a meeting of the arbitration panel should be held, the competent authorities will jointly decide when and where the meeting will be held, including whether the meeting should be held virtually or in person, and will communicate that information to the arbitrators.
- (e) The arbitrators will decide the issues submitted to arbitration in accordance with the applicable provisions of the Agreement and, subject to these provisions, of those of the domestic laws of the Territories. The arbitrators will also consider any other sources which the competent authorities of the Territories may jointly decide to expressly identify.
- (f) Subject to the provisions of the Agreement, and of these Arrangements, the arbitrators may adopt those procedural and evidentiary rules that they deem necessary to provide a decision concerning the unresolved issues submitted to arbitration.
- (g) Unless the competent authorities jointly decide otherwise, the arbitration decision will be delivered to the competent authorities of the Territories in writing within 365 days after the date of the appointment of the Chair and will indicate the sources of law relied upon and the reasoning which led to its result. The arbitration decision will be adopted by a simple majority of the arbitrators. The arbitration decision will have no precedential value.

## **Part 6.       Communication of information and confidentiality**

6.1. Each arbitrator must agree in writing, prior to acting in an arbitration proceeding, to abide by and be subject to the confidentiality and non-disclosure provisions of Article 26 of the Agreement and of the applicable domestic laws of the Territories. If an arbitrator will use staff in connection with the performance of his or her duties, each staff member must execute a similar written agreement.

6.2. Before the Chair is appointed, the competent authorities will send any correspondence concurrently to both arbitrators.

6.3. After the Chair is appointed, unless jointly decided otherwise by the competent authorities and the Chair, the competent authorities will send any correspondence to the Chair (with a copy sent to the other competent authority). The Chair will send any correspondence from the arbitrators to the competent authorities concurrently to both competent authorities.

6.4. Except with regard to administrative or logistical matters, no arbitrator will have any *ex parte* communications with one competent authority with respect to the mutual agreement case that resulted in the arbitration proceeding.

6.5. All communication, except with regard to administrative or logistical matters, between the arbitrators and the competent authorities must be in writing. Unless otherwise jointly decided by the competent authorities, written communication by email is allowed to the extent that appropriate measures are taken to preserve the confidentiality of any information that may identify the taxpayer.

6.6. No substantive discussions may take place without all three arbitrators present.

6.7. Except as permitted pursuant to subparagraph 5.7(c), no arbitrator will have communications regarding the issues or matters before the arbitration panel with:

- (a) the person who presented the case;
- (b) any other person whose tax liability to either Territory may be directly affected by a mutual agreement reached as a result of the case; or
- (c) their representatives or agents;

during or subsequent to the arbitration proceedings.

6.8. At the termination of the arbitration proceedings each arbitrator will immediately destroy all documents or other information received in connection with the proceedings.

## **Part 7. Operating procedures**

7.1. To the extent needed, the arbitration panel may adopt any additional procedures necessary for the conduct of its business, provided that the procedures are not inconsistent with Article 25 of the Agreement.

7.2. If the arbitration panel adopts any additional procedures, the Chair will provide a written copy of them to the competent authorities. These procedures will have effect unless either competent authority objects within 14 calendar days following receipt of the proposed additional procedures.

## **Part 8. Costs**

8.1. Unless jointly determined otherwise by the competent authorities:

- (a) each competent authority and the person who requested the arbitration will bear the costs related to its own participation in the arbitration proceedings (including travel costs and costs related to the preparation and presentation of its views);
- (b) each competent authority will bear the remuneration of the arbitrator appointed exclusively by that competent authority, or appointed by the highest ranking official of the Centre for Tax Policy and Administration of the Organisation for Economic Co-operation and Development that is not a person holding British nationality because of the failure of that competent authority to appoint that arbitrator, together with that arbitrator's travel, telecommunication and secretariat costs;
- (c) the remuneration of the Chair of the arbitration panel and that Chair's travel, telecommunication and secretariat costs will be borne in equal shares by the two competent authorities;

- (d) other costs related to any meeting of the arbitration panel will be borne by the competent authority that hosts that meeting, unless the meeting is hosted by neither competent authority, in which case the costs related to such a meeting will be borne in equal shares by the two competent authorities;
- (e) other costs related to expenses that both competent authorities have jointly decided to incur will be borne in equal shares by the two competent authorities.

8.2. Unless jointly determined otherwise by the competent authorities, compensation of the arbitrators will be determined as follows:

- (a) The fees of the arbitrators will be fixed at £850 per person per meeting, preparation or travel day. The reimbursement of the expenses of the arbitrators will be limited to the reimbursement usual for high ranking civil servants of the Territory that first received the request for submission of the unresolved issue(s) in the case to arbitration.
- (b) The fees of the arbitrators will in no case exceed £5,850 per person. The expenses reimbursed to the arbitrators will in no case exceed £5,850. If the arbitration panel considers that the proper consideration of the case would cause the fees or expenses of the arbitration panel to exceed these amounts, the Chair will contact the competent authorities to request their guidance.

## **Part 9. Failure to communicate the decision within the required period**

9.1. In the event that the decision has not been communicated to the competent authorities within the period provided for in paragraph 5.6 or subparagraph 5.7(g), as the case may be, or within any other period jointly determined by the competent authorities, the fees of each arbitrator will be limited to an amount jointly determined by the competent authorities at the time. In such a case, the competent authorities may jointly decide to appoint new arbitrators in accordance with Part 4 of these Arrangements. The date of such joint decision to appoint new arbitrators will, for the purposes of the subsequent application of Part 4 of these Arrangements, be deemed to be the date when the request for arbitration has been received by both competent authorities.

## **Part 10. Final decision**

10.1. If a final decision by a court of one of the Territories holds that the arbitration decision is invalid, the arbitration decision will not be binding on the Territories. In such a case, the request for arbitration under Article 25 of the Agreement will be considered not to have been made, and the arbitration process will be considered not to have taken place (except for the purposes of Parts 6 and 8 of these Arrangements). In such a case the person who made the request for arbitration may make a new request for arbitration, which will be accepted unless the competent authorities jointly determine that the actions of that person or its representatives were the main reason for the invalidation of the arbitration decision.

10.2. It is understood that paragraph 10.1 of these Arrangements is intended to apply where, under the domestic laws of a Territory, a court has invalidated the arbitration decision based on a procedural or other failure or other conduct that has materially affected the outcome of the arbitration proceeding, which may include:

- (a) a violation of the impartiality or independence requirements applicable to arbitrators pursuant to Part 4 of these Arrangements;
- (b) a breach of the confidentiality requirements applicable to arbitrators pursuant to Part 6 of these Arrangements;
- (c) any other failure to adhere to the procedural requirements provided in these Arrangements; or
- (d) collusion between the person who presented the mutual agreement procedure request and one of the Territories.

10.3. It is understood that Part 10 of these Arrangements does not provide independent grounds for the invalidation of an arbitration decision where such grounds do not exist under the domestic laws of the Territories.

## **Part 11. Implementing the arbitration decision**

11.1. Unless the competent authorities jointly decide on a different resolution of all unresolved issues in the case, the competent authorities will adopt the arbitration decision

within 3 calendar months after the communication of the decision to them by reaching a mutual agreement on the case that led to the arbitration.

11.2. The mutual agreement reached will only be given effect after all persons directly affected by the case have confirmed, in writing, their acceptance of that mutual agreement and that they have withdrawn all issues resolved by the decision from consideration by any court or administrative tribunal or have otherwise terminated any pending court or administrative tribunal proceedings with respect to those issues in a manner consistent with that decision.

## **Part 12. Entry into effect of Article 25 of the Agreement**

12.1 As provided by Article 28 of the Agreement the arbitration provisions within Article 25 of the Agreement will have effect with respect to cases presented to the competent authority of a Territory on or after the date on which the Agreement entered into effect.



## **Part 13. Effective date and modifications**

13.1 This MOU becomes effective on the later of the two signature dates below.

13.2 This MOU may be modified at any time where jointly decided by the competent authorities.

13.3 This MOU is concluded for an indefinite period of time. It may be terminated by written notification by either competent authority or will be terminated at the time of termination of the Agreement.

## **Signatures**

	
Nicola Forshaw Director of the Revenue Service	Edmond Burrows UK Delegated Competent Authority For HM Revenue and Customs
<b>Date:</b> 16/06/2022	<b>Date:</b> 16/06/2022