COMMENTS ON THE PROPOSED NEW BUSINESS TAX SYSTEM (DEBT AND EQUITY) BILL 2001

My initial comments on the proposed draft are as follows:

1. Why has the proposed section 25-85 from the original draft Bill not been repeated? That was a fair provision ensuring the symmetry of treatment required in this move from form to substance. If, as stated, the reason for these provisions is to more accurately reflect the economic reality, such a provision must be in place. The clarity and provision of that section (versus the imprecision of section 25-85(2) in this draft) is noteworthy.

2. The structure of section 25-85 is inappropriately vague and uncertain. What is it meant to achieve? Does it seek to modify the non-deductible capital portion of an outgoing? Generally it seems to me that you should never use a word like "merely" in a deduction provision. This effectively provides almost no guidance at all in a self-assessing regime.

3. The provisions proposed are very difficult to comment upon until the form, content and scope of the Regulations is considered.

4. What if an interest is taken in a company and the return is paid by a parent? What is an interest is taken in a trust and the return is paid by a parent? What if the return obligations are defeased by the company so that the eventual distribution is paid by an unrelated third party? Section 153-12 does not appear to extend to this situation nor does section 960-204(3). The problem appears to be the narrowness of the definition of holder of an equity interest.

5. Presumably section 25-85 can only apply to fixed instruments as a variable return could not satisfy the prescription in section 25-85(3).

6. The expected effect of section 25-85(3) and (4) is unclear. Is it that, notwithstanding any regulation, if a particular return or portion thereof was deductible under general principles it remains deductible?

7. Section 26-26 now properly covers general principles accruals of debt (in form) interests that might be treated as equity under the new provisions. However it is unclear how it is expected that the receipt of such distributions is now to be assessed. By amending the concept of "paid" for non-share dividends tying those non-share dividends than into a new section 44(1) begs the question whether under general principles a mere accrual as opposed to the narrow concept of crediting that has developed in respect of dividends, could assess a non-share dividend on the basis of a mere accrual, for example, pursuant to Conveyancing Act principles or general common law. It would seem appropriate to note that non-share dividends can only be assessed under section 44 so as to make it an exclusive regime as it is likely to be for the purposes of dividends.

Section 22

21. Section 153-60 is unnecessarily narrow dealing with non-share distributions "to you". For all purposes, this section is used as the definition of non-share distribution. Hence it

applies for the purposes of the application of section 26-26 to deny deductions to the person distributing it. What then happens if the distribution is not to a holder, for example, an assignee? The link to section 26-26 does not appear able to be made easily.

Section 22

27. The definition of dividends is not being amended to include non-share dividends. It is assumed this is deliberate so that for example, section 23AJ will not extend to non-share dividends. This would clearly be difficult given the voting etc issues involving in such provisions – see also section 160AFB.

Thank you for the opportunity to review the draft. It is indeed an extremely difficult area of form and is worth the effort to clarify as far as possible the expected and intended effects of the provisions.

Please let me know if any of my comments require further discussions.

Kind regards