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Notification of uncertain tax treatment by large businesses – draft HMRC guidance

Comments by the Chartered Institute of Taxation

1 Executive Summary

1.1 The Chartered Institute of Taxation (CIOT) is the leading professional body in the UK for advisers dealing with all aspects of taxation. We are a charity and our primary purpose is to promote education in taxation with a key aim of achieving a more efficient and less complex tax system for all. We draw on the experience of our 19,000 members, and extensive volunteer network, in providing our response.

1.2 Following two consultations, the government published draft legislation in July 2021 for the new compliance obligation for large businesses to notify uncertain tax treatments to HMRC. This draft legislation will be included in Finance Bill 2021-22, with the obligation applying in respect of returns that are required to be made after 1 April 2022. In August 2021 HMRC also published draft guidance, and below are our comments on this draft guidance. The CIOT has also commented on the draft legislation and our comments here should be read in conjunction with our comments on the draft legislation.

1.3 Generally, the guidance is well written and it is helpful that it (broadly) follows the legislation. However, there are a number of areas where clarification is required and further detail could be provided. In addition, although the number of examples is helpful in principle, some of these could be better targeted.

1.4 As we have said in our responses to the consultations on this measure and in our comments on the draft legislation, it is unrealistic to suppose that this measure will not result in a significant compliance burden for all large businesses, whether or not they are open and transparent with HMRC. This is because all large businesses will have to take steps to assess and monitor the impact of this measure on their business, even if they routinely discuss areas of tax uncertainty with their Customer Compliance Manager (CCM). Ensuring that there is clear and practical guidance around how HMRC interpret the legislation and intend to apply it in practice will ensure that the administrative burden is reduced for large businesses (and HMRC) as much as possible.

1.5 More generally, we welcome the recognition of the increased importance of guidance because of this measure and the commitment that HMRC will look for opportunities to improve their technical guidance, given in the Policy Paper published on 20 July 2021 alongside the draft legislation for this measure.

2 About us

2.1 The CIOT is an educational charity, promoting education and study of the administration and practice of taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. Our comments and recommendations on tax issues are made solely in order to achieve this aim; we are a non-party-political organisation.

2.2 The CIOT's work covers all aspects of taxation, including direct and indirect taxes and duties. Through our Low Incomes Tax Reform Group (LITRG), the CIOT has a particular focus on improving the tax system, including tax credits and benefits, for the unrepresented taxpayer.

2.3 The CIOT draws on our members' experience in private practice, commerce and industry, government and academia to improve tax administration and propose and explain how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries.

2.4 Our members have the practising title of 'Chartered Tax Adviser' and the designatory letters 'CTA', to represent the leading tax qualification.

3 Scope - UTT 12000

3.1 The introduction of this measure, explaining the scope, refers to both the Senior Accounting Officer (SAO) and the Publication of Tax Strategies (PoTS) regimes. This is potentially a little confusing as, although the scope of this measure may be based on the same turnover and balance sheet tests as these two regimes, the other criteria mean that it does not fully align with either of them. The SAO regime covers companies that are incorporated in the UK, not just those that are tax resident, whereas PoTS is based on the tax residence of the parent company of a group, the definition of group in relation to this regime means that there could be a third list of companies included within its scope. We suggest that the guidance should clarify this.

3.2 In section '2.', which mentions the person that may be notifying, we suggest that this should be amended to read as follows:

'The person notifying may vary depending on the type of entity and ~~the head of tax~~ /or the type of tax.'

3.3 We note the reference in UTT12200, which describes the definition of group, to the exception for a company providing investment management services which has a 51% subsidiary that it manages in the ordinary course of its business. This is reflective of the draft legislation (sub-paragraphs 3(3)–(5)), but the position seems surprising to us, as it would apply to circumstances where the investment manager owns 51% of the fund. In our experience, this would be very unusual. Perhaps HMRC could give an example of the situation they have in mind? For example, is this aimed at asset holding companies within an insurance group? We are aware of situations where the fund owns its asset management company (that is to say it is self-managed). However, it seems to us that, in these circumstances, it would be necessary to consider the whole of the fund to apply the threshold.

3.4 At the end of UTT12300 (Entities in Scope) 'Public Bodies' are discussed. We suggest that some further clarification around these may be required. 'Public Body' is not defined and there is nothing in the draft legislation that excludes a Public Body from being a company for the purposes of this measure if the Public Body is established as a body corporate. If it was so incorporated, it would fall within the definition of 'company' in sub-paragraph 2(1). We understand that local authorities are often body corporates (although not normally established under the Companies Acts). Please clarify the position with regard to local

authorities and other public bodies that may be bodies corporate. Is the intention to deal with these in regulations which can be made under sub-paragraph 2(6)?

4 Notification criteria – UTT 13000

4.1 In the description of the notification criteria in the overview at UTT13000, under '**1. Provision made in the accounts**', the last line should be changed from 'will be applied' to 'may be applied'. A provision in the accounts does not necessarily mean the final accepted tax position will be in line with that. We recognise that this description is a reflection of the draft legislation, which should be amended in the same way. This notification criterion is better described in the commentary on it at UTT13100, which notes that the '*provision has been recognised …….. to reflect the probability that a different tax treatment may be applied ….*' (our emphasis).

4.2 The guidance under UTT 13000 (Overview of Notification Criteria) says that all three notification criteria need to be quantified and the largest amount included on the notification; this could lead to a potentially large burden on the taxpayer. For example, if a provision has been included in the accounts for more than £5m a notification will be required. Further estimation of the tax advantage arising under the other two notification criteria amounts significantly increases the compliance burden without any benefit to HMRC, given that all of the numbers will be estimates. International Financial Reporting Standards require an uncertain tax position to be measured based either on the most likely outcome or a probability weighted average in a scenario where there are multiple outcomes with similar likelihood. The measurement criteria under the second and third triggers do not follow this assessment and so could give rise to a larger amount. The range of outcomes could also be quite significant in the case of some uncertain tax treatments and we suggest, therefore, that a range rather than an absolute value would be a more appropriate basis for notifying HMRC. We refer also to our comments at paragraph 8.6 below around the application of the threshold test to the largest expected amount. This is a similar point, but we understand that it is appropriate to ensure that a notification is required if any of the criteria meet the threshold. This is a different point to requiring further calculations once a notification is required based on one of the criteria. At this point it is harder to see that further work is justified.

5 Notification criteria - UTT13200 – HMRC's Known Position

5.1 As discussed in our comments on the draft legislation, sub-paragraph 9(6), which sets out circumstances in which HMRC's position on a matter is taken to be 'known' will be challenging for businesses to apply in practice. As currently drafted, the guidance at UTT13200 does not provide clarity.

5.2 Initially, we would welcome some further explanation of the table in the draft guidance. It would be helpful to understand the rationale for including the particular categories of material as either indicating HMRC's view or not doing so. For example, we are surprised that Explanatory and technical notes relating to legislation are not considered to be indicative of HMRC's view? And, what are 'Publications which set out HMRC's view of tax compliance risk in relation to certain transactions'?

5.3 The table also says that 'Advice provided via On-line HMRC forums' should not be considered to indicate HMRC's known view. We agree with this, but would welcome confirmation that this also extends to discussions at in person stakeholder groups and the minutes of these meetings (for example, the JVCC, HMRC's Employment and Payroll Group and the R&D Consultative Committee). We suggest that the minutes of these stakeholder groups should not be something that taxpayers have to consider because they are unlikely to be widely read and minutes of forum meetings are generally archived after a change of

government. While these meetings, and the minutes of them, may be a useful place for HMRC to state 'we are updating our guidance to say…' (or something similar), the minutes should not be considered to be a source of HMRC's known view. If HMRC wish to make a statement of their view on a particular matter, they should ensure that a Revenue & Customs Brief, or other Public Notice is published, or the relevant technical guidance is updated.

5.4 Similarly, the guidance could usefully clarify that publications like the Employer Bulletin are also not indicative of HMRC's known position. Even regular publications such as this generally only have the past five editions available on GOV.UK (older editions are in the National Archives if you know where to look). It is not reasonable to expect businesses to trawl through minutes of stakeholder groups or forum meetings or editions of bi-monthly bulletins for HMRC's views on a topic.

5.5 The guidance concludes that the lists in the table are not intended to be exhaustive, and are merely illustrative. This is unhelpful because without any explanation of the rationale of why the particular items are in the table, and the perceived distinction between the items on the lists, it is difficult to use these examples of types of materials published by HMRC to understand HMRC's view of the legislation. Please could further explanation be given in the guidance as to how the table has been drawn up.

5.6 More generally the remaining commentary in the draft guidance around 'Changing and updating of HMRC Publications' and 'Outdated or Contradictory HMRC Publications' merely emphasises the very real practical difficulties that will arise for businesses trying to ascertain HMRC's known interpretation.

5.7 We note the discussion around circumstances where 'it is obvious that HMRC guidance is outdated or contradictory' and that in those circumstances a notification is not required (provided that no other notification criterion applies). We assume that this on the basis that in these circumstances HMRC's position cannot be 'known', because it is inherently unclear from information that is publicly available, either in addition to the guidance that is considered 'outdated or contradictory' or in other parts of HMRC guidance, and thus is 'outdated or contradictory'. This seems to be confirmed in the Explanatory Notes which were published with the draft legislation which say (at paragraph 93): '*In instances where HMRC's position is unclear, or two different expressions appear contradictory, there will be no 'known position' and the second condition will not be met.'*

5.8 It may be helpful for the guidance to also comment on what happens if there are differences of opinion as to whether or not the guidance is 'outdate or contradictory'. Our view is that a belief of the taxpayer that this is the case could be considered to be a reasonable excuse for not notifying the tax treatment. In this regard, we welcome the explicit confirmation in the guidance that there is no requirement to notify HMRC of an uncertain tax treatment if HMRC's position is not known, and suggest that the guidance links these points up.

5.9 The guidance also says that '*Notification is still required where there is legal uncertainty that HMRC's view is correct, for example, where the Upper Tribunal has found HMRC's view to be incorrect, but that judgement is being appealed.*' We suggest that this may be problematic in practice for businesses to be able to determine.

5.10 The draft guidance at UTT13200 says:

- '*HMRC publications may be out of date …… for several reasons. For example: …… Court or Tribunal judgements change the established understanding of the law and HMRC's guidance has not yet been updated to reflect the new position*.'

- '*Where it is obvious that HMRC guidance is outdated or contradictory, and other notification criteria do not apply, a notification is not required…… A belief…..that the guidance is wrong will not in itself mean that notification is not required*.'

- '*Notification is still required where there is legal uncertainty that HMRC's view is correct, for example where the Upper Tribunal has found HMRC's view to be incorrect but that judgement is being appealed*. '

- '*For the purposes of a tax return, it remains the case that the business is responsible for ensuring that it has self-assessed in accordance with the law*.'

These statements lead to many areas of potential uncertainty for a large business trying to apply this notification criterion. For example, a business may think that HMRC guidance is wrong as an Upper Tribunal decision says it is wrong. On the one hand the business must apply the tribunal decision when submitting its tax return (as the tribunal decision is binding and ignoring it would mean that the return is not 'in accordance with the law'). However, it seems from the draft guidance in UTT13200 that HMRC will believe that a notification is still required if they are appealing the tribunal decision – but the business may not know that an appeal is ongoing (either from the tribunal decision or from a higher court at a later state of the proceedings).

5.11 Unfortunately, it is not currently HMRC practice to state publicly whether they are appealing a tribunal or court decision or not in respect of all relevant taxes (there is some information in relation to VAT at https://www.gov.uk/government/publications/vat-appeal-updates/vat-appeal-updates which, we understand, is updated every couple of months). It is also generally not possible to assume that HMRC are not appealing a decision. Even if the time limit for an appeal has passed, HMRC could be appealing the decision, but the information about this may not be in the public domain due to the shortcomings in the various court lists and delays that occur in updating them. (In this regard, as far as we understand it HMRC has no control over whether the Courts Service keep publishing the court lists in the same way/frequency that they do at present. Therefore, if the Court of Appeal (say) decides to publish less information then this could affect how well a business can comply with this measure.)

5.12 In light of the fact that businesses may face a penalty for failing to notify an uncertain tax treatment in these circumstances, we suggest that this part of the guidance should be revisited, and revised to make the position clear. In particular, it does not seem right that a business can be penalised for assuming that HMRC are not appealing a decision where no information is available to demonstrate an appeal is, in fact, in progress. Given how difficult it is going to be for businesses to deal with the requirement to notify uncertain tax treatments on a day to day/year to year basis, we encourage HMRC to make the guidance (and legislation) as clear as possible so that advisers large businesses have to make as few assumptions as possible.

5.13 To address this, HMRC could consider whether there are more circumstances in which they can publicly state at the earliest opportunity their decision about whether or not to appeal a decision. In addition, HMRC should provide links to where a business can find the appeal lists. HMRC should also consider that an alternative way for this issue to be dealt with is for the guidance on notification of uncertain tax treatment to say that HMRC will always accept that a business has a reasonable excuse for not notifying an uncertain tax treatment if there is no publicly available information demonstrating that HMRC is continuing to appeal.

5.14 The legislation, at sub-paragraph 9(6) sets out two tests as to how HMRC's 'known' position may be apparent: either from published material by HMRC (which is of general application and readily available and in the public domain) or because of dealings of the business with HMRC. It would be helpful if the guidance could clarify the position in circumstances where HMRC's known position might be different as a result of applying these two tests. For example, HMRC's guidance clearly sets out a view, but the business has had dealings with HMRC which indicate that HMRC's position on a particular tax treatment is different to that set out in the guidance.

Is the business entitled to rely on HMRC's known position based on its dealings with HMRC and, if its tax treatment is in accordance with this position, assume that it is not uncertain, notwithstanding the contrary HMRC's 'known' position in other published material?

5.15 The legislation at sub-paragraph 9(6)(b) is very broad. It suggests that:

- There is no requirement for the 'dealings' with HMRC to have been in writing.
- The dealings might have been about a previous transaction.
- The dealings might be between HMRC and a business' advisers: the dealings needed only to have been 'by or in respect of the company or partnership'.

Thus, it could be suggested that a taxpayer should have known what HMRC's view is because HMRC had, at some time in the past, expressed the view during a telephone call, about another deal entirely, with the adviser that had been acting for the taxpayer at the time. This seems to us to be too broad and, we suggest, that the use of the word 'apparent' in the introductory words of sub-paragraph 9(6) mean that some of the constraints around making information available to HMRC in respect of the general exemption also apply in respect of HMRC's view being known to taxpayers through 'dealings with HMRC'.

5.16 The draft guidance currently deals with sub-paragraph 9(6)(b) very shortly at the end of UTT13200. It would be helpful if some further commentary could be provided here, as well as some examples to demonstrate how HMRC's position is 'apparent' from the dealings referred to for the purposes of this notification criterion.

5.17 An increased focus on a businesses' dealings with HMRC may, in fact, improve the collaborative compliance experience for large businesses. An issue that many businesses currently face in practice is that HMRC are unable to reciprocate effectively to the full extent of businesses' willingness to engage. CCMs are often not empowered to make case by case decisions, and the legislation does not accommodate a clearance process for most issues, particularly if it is difficult to identify any significant degree of uncertainty. Currently few CCM's are prepared to confirm HMRC's position to a taxpayer. Ensuring that the business does, in fact, know HMRC's position in respect of any particular transaction would be welcome to many large businesses.

6 Notification criteria – UTT 13300 – Substantial possibility

6.1 As per our comments on the draft legislation, this criterion is loosely drafted and poorly conceptualised, inherently imprecise and, therefore, unclear and uncertain. However, in terms of providing some practical assistance for taxpayers, the guidance under UTT13300 starts well; until the end of the bullet points the draft guidance is generally helpful.

6.2 Beyond the bullet points, the next paragraph is not very clear. This says:

'*A factor that suggests there is not a 'substantial possibility' that an alternative treatment would be found to be correct by a tribunal or court, is a written indication from HMRC that there is no material uncertainty about the tax treatment*.'

What does this mean? Does it mean that, if HMRC has specifically said the tax treatment is not uncertain, that there is no material uncertainty, a taxpayer can rely on this view from HMRC and does not need to consider further whether there is a substantial possibility that a tribunal or court would take an alternative view? This is helpful. Or does this refer to situations where when asked, HMRC simply said that in their view there was no uncertainty on the position, but did not confirm whether they shared the view that the taxpayer is taking? Please could HMRC look again at this paragraph and clarify what is meant.

6.3 The next paragraph says:

'*HMRC does not expect it will be necessary that legal advice should be obtained in order to comply with the Uncertain Tax Treatment regime. We expect a level of governance proportionate to the tax risk and level of uncertainty*.'

We welcome this comment from the perspective of HMRC confirming that it is not necessary for businesses to seek legal advice to comply with the regime, and that it is appropriate and reasonable for them to reach a conclusion about the notification criteria independently. However, in our view, where a notification is made under this measure, advice will often have been taken. We think that many businesses (particularly those without an in-house tax function, or whose in-house tax function does not have the relevant expertise) will want an external view on what position a tribunal/court is likely to take, adding to the compliance burden and cost.

6.4 There is some imprecise language under the heading 'Material Respects', in the first sentence: '*The Substantial Possibility trigger will only apply where it is reasonable to conclude that a court or tribunal will find the tax treatment applied incorrect in one or more material respects.*'. This is wrong. There does not need to be a conclusion that the court or tribunal 'will' find the treatment incorrect. To avoid being misleading, this sentence should be deleted together with the word 'Therefore' in the following sentence. The point on materiality will still be made by the remaining text. It is important that the guidance correctly reflects the legislation so as not to exacerbate the difficulties that already arise from this notification criterion.

6.5 The two examples given on situations where there might be a substantial possibility a court or tribunal would find a material error in the taxpayer approach taken are not helpful. They are not illustrative of how to determine whether there would be a substantial possibility a tribunal or court would find a materially incorrect circumstance in the taxpayer's approach. All they seem to do is illustrate situations where uncertainty may exist. Further, both seem to be circumstances where there is a known HMRC view. Therefore, if a different view is being taken, we assume that sub-paragraph 9(3) criterion would apply. Whilst the possibility of overlap between the criterion is acknowledged, and we do not object to this per se, it would be helpful if, in this part of the guidance, HMRC could use an example that would only fall within sub-paragraph 9(4) to demonstrate why this criterion is required in addition to sub-paragraph 9(3).

6.6 In Example One, the uncertainty is whether the transaction should be treated as a TOGC. However, the guidance suggests that this will be determined by a tribunal agreeing with HMRC, or not, that the interest in land not transferred is small – so the example suggests that the uncertainty is around 'smallness'. This point is not around semantics – it is the difference between an uncertainty created by legislation (or case law) and one created by guidance. Since HMRC's guidance on when such a transfer is a TOGC is based on tribunal decisions, it is the tribunal decisions that should be mentioned here, not the HMRC guidance on such transfers – and it is the underlying tribunal decisions that should be being considered not HMRC guidance when determining whether the substantial possibility test is met.

6.7 We suggest that guidance that is more helpful could be drawn from actual tribunal decisions. To take two recent decisions:

Roger Preston Group Ltd [2021] TC08025 (Croner ref) [2021] UKFTT 0038 (TC) (neutral ref)

Here, the taxpayer won convincingly. Had the facts been such to make this a dispute within the scope of the new legislation (by which we mean size of company and size of dispute) we think the taxpayer would have been within their rights **not** to notify an uncertain tax position under the substantial possibility criterion. Does HMRC agree? Given the importance of accounting evidence to the decision and the weight of accounting evidence held by the taxpayer, it seemed that HMRC had little chance of success.

Aozora GMAC Investment Ltd [2021] TC 08171 (Croner ref) [2021] UKFTT 0222 (TC)

Whilst the taxpayer won this case, we suggest that had this dispute been in scope the taxpayer would have been required to notify under the 'substantial possibility' test, assuming neither of the other tests applied. Despite detailed technical arguments from both sides, the decision was based on a contextual interpretation of a single word. Where the margins are so fine, it is more reasonable to suggest that there was a 'substantial possibility' that the treatment would be found to be incorrect by a tribunal or court.

6.8 In seems to us that in order to determine whether the substantial possibility test applies the taxpayer has to 'get into the mind' of a tribunal or court, and that is why HMRC guidance needs to do the same; it's also why we think advice will be needed in many cases by taxpayers on this test.

6.9 The guidance could comment more usefully on sub-paragraph 9(7). There is a statement in the second paragraph under UTT13300 that merely repeats the legislation. The statement in the Explanatory Notes (at paragraph 36) is more helpful: 'Sub-paragraph 7 provides that the test for the purposes of sub-paragraph (4) is not whether HMRC would challenge the position taken by the taxpayer. Therefore if HMRC challenges a tax position it does not automatically follow that the position was notifiable.'.

7 Threshold test – UTT 14000

7.1 We suggest that the guidance could provide some more detail around how HMRC considers the legislation operates with regard to VAT and whether it is the gross or net position that should be taken into account in arriving at the 'uncertain amount', 'the expected amount' and the 'tax advantage'. Clearly the Exchequer cost is impacted by the way that the VAT rules work, with input VAT being offset against output VAT within a business.

7.2 For example, consider a very straightforward example where a business buys a product that it considers should be treated as exempt. It pays £100 for this and sells it for £120. If, in fact, it transpires that the product should have been standard rated, the business should have charged output VAT in respect of the sale of the product – so of the £120 received, £20 is output VAT to be accounted for to HMRC and £100 is kept by the business. However, it must also be treated as having incurred input VAT on the purchase of the product. Thus, of the £100 paid, £16.67 is input VAT, which can be offset by the business against its output tax liability. Thus, we would expect that the 'tax advantage' to the business is £20 output VAT less £16.67 input VAT = £3.33 (or the VAT on the 'profit' element of the sale). We would not expect it to be the gross amount of £20 output VAT.

7.3 It is not clear from the draft guidance how the rules in the legislation (paragraphs 10, 12 and 13), which set out how to calculate the various components in order to determine whether the threshold test is met, operate in relation to VAT. The draft guidance appears to suggest both approaches in different circumstances.

7.4 The penultimate paragraph in the introductory paragraphs under the heading VAT in UTT14200 (Tax advantage), under the bullet points says that 'The tax advantage calculation in relation to output tax is not to be offset by any input tax. However, the last paragraph in this section says that for a partly exempt business it is the net position (as per the returns and declared amounts) that is taken into account. This latter position is reflected in VAT Example Two (in relation to the 'branch in VAT group' arrangement), which references the net amount of £15m as the tax advantage. However, it is not clear how this position is arrived at from the legislation, which does not draw a distinction between partly exempt businesses and other businesses that are, presumably, fully taxable or exempt from a VAT perspective.

7.5 The CT Example Two under UTT14200 (Tax advantage) could clarify which notification criterion of uncertain tax treatment is being applied to decide that there a notification is required. We assume that this is the tax provisions criterion, but it would be helpful if the guidance could confirm this.

7.6 We also refer to the PAYE Example of under UTT14200 (Tax advantage), which refers to 'Check Employment Status for Tax' (CEST). HMRC make clear elsewhere in their guidance (see Check employment status for tax - GOV.UK (www.gov.uk)) that a business does not have to use CEST if it wishes to assess tax status by other means (for example, internally, using another tool, taking independent advice etc.) We suggest that this guidance should confirm this remains HMRC's position to dispel any implication that might otherwise be drawn that this example suggests that CEST should/must be used. The guidance could also usefully clarify what happens if, as crops up more often, the non-CEST result says 'self-employed' whereas the CEST result is 'uncertain'. Are we right in thinking there would be no requirement to notify in these circumstances, because HMRC has no known view – indicated by the 'uncertain' result of CEST? Explicit reference on both these points in the guidance would be helpful.

7.7 More generally, in relation to UTT 14300 (The expected amount), under the heading More than one notification criterion met, the draft guidance explains that if there is more than one expected amount because more than one notification criterion is met, the largest amount must be taken. It also explains that where there could be more than one expected amount in relation to a single notification criterion, the largest amount must be taken. The first statement is consistent with paragraph 13(2) of the draft legislation. The second statement appears to have no statutory basis.

7.8 Paragraph UTT14400 of the draft guidance discusses what is the relevant period. In relation to partnerships, the draft guidance says the following:

'***Example - Partnership tax return***

For a partnership tax return relating to financial year end of 31 December 2024, the relevant period is the 12-month period ending on 31 December 2024 for the purposes of applying the threshold test. A resulting notification will then normally be due by 31 December 2025, where applicable.'

This seems to be too simplistic for a partnership return as we think that the filing deadline quoted is only relevant where all members of the partnership are companies. HMRC's guidance on the deadlines for filing partnership returns is covered at SALF503, and for an annual return, the deadline for notification in the draft legislation is '…on or before the date on which the return is required to be made.' We suggest that the draft guidance is expanded to include partnerships which have individual partners as well as corporates.

7.9 The draft guidance at UTT14500 explaining how HMRC view related amounts is helpful. In particular, the statements that businesses should consider whether '*the uncertain tax treatments are as a result of applying the same reasoning*', and whether if one was incorrect '*then any other tax treatments that will resultantly also be incorrect*' seem to reflect a sensible approach.

7.10 However, some further clarity could be provided around the statement that the aim of this is focussed at high volumes of low value, but related transactions. It would be helpful to include an example as to how this applies in relation to VAT on property and construction transactions. This amalgamation would clearly be relevant to consumer products – perhaps where it was arguable whether a food item was zero-rated. It is less obviously relevant to property and construction, but clearly it could be if, for example, a number of residential units were built to a standard design. But the draft legislation could be construed as going further. Paragraph 10(2) requires aggregation of '*the uncertain amount, and any related uncertain amounts*', and paragraph 15(1) elaborates on 'related'. Two uncertain amounts are related if they arise in the same financial year and

'*the tax treatment applied in arriving at one amount is substantially the same as the tax treatment applied in arriving at the other amount*'.

7.11 This does not suggest that the products or transactions need to be similar, or that the underlying analysis needs to be. Rather, treating two transactions as exempt, or as a TOGC, would seem to be a case of applying the same tax treatment, even if the two transactions are very different even, indeed, if they fall under different exemptions. It would be helpful if an example could be included in the guidance that confirms that this is not HMRC's view of how the legislation should be applied.

7.12 Sub-paragraph 15(2) of the draft legislation says that national insurance contributions (NIC) are to be treated as income tax for the purposes of this paragraph (which identifies related amounts), thus counting towards the threshold test in paragraph 10(2). The treatment of a transaction for the purposes of income tax (PAYE) and NICs is often different. We understand that if the NIC treatment results in a cumulative cost to the Exchequer, where there is an uncertain tax treatment in respect of PAYE, this is something that the government would wish to capture. However, it would be helpful if the guidance made clear that, where the income tax treatment is uncertain but the NIC treatment is not, then an amount in respect of NIC is <u>not</u> treated as if it was income tax in computing the aggregate amount of the potential advantage.

7.13 We can use the Example - PAYE Related Amounts under UTT14500 to illustrate this. Suppose the facts are the same but a couple of the executives whose contracts of employment are terminated are seconded from the USA and dealt with under a US certificate of coverage for social security purposes, that is to say they are subject to Federal Insurance Contributions Act (FICA), the USA federal social security contributions, and not NIC. In these circumstances, we do not think that any NIC amount should be added to the income tax saved by virtue of the employer's approach taken in respect of ITEPA 2003 section 401. It would be helpful if the guidance could include this additional example, addressing the case where some of the executives are from the US and paying FICA rather than NIC and clarify the position.

7.14 We would also welcome some further clarification in respect of the last example under UTT 14500 (Related amounts). It is not clear in the Example – PAYE & CT Related Amounts whether these amounts are related to each other. Paragraph 15(1)(b) of the draft legislation, which reads '*both amounts related to the same relevant tax…*', would suggest not. Thus, if both amounts are below £5m but the combined amount exceeds £5m is the threshold met? What if one is above and one below are both notifiable? Further explanation of the example would be helpful.

8 Notification process – UT15000

8.1 We note that the notification of uncertain tax treatments is going to be done via a digital form accessible from within the business's Government Gateway. Given the description at UTT15100 (immediately following the heading <u>Notification Form Specifications</u>) we would welcome further details around:

(a) whether the adviser/agent can access and complete the form, or whether this is something that only the business can do; and

(b) if the latter, please can HMRC put the pro forma in the guidance so that agents can draft the wording for the submission for the business to submit.

8.2 In the past there have been issues with online forms: for example, once filled in there are difficulties printing it or it is not possible to save the form as a draft. We expect that many businesses will wish to take advice on what to write on the notification forms, so, in order to minimise the compliance burden arising from this measure, it will be important that the process of notification is as efficient and user friendly as possible.

8.3 We note that there is nothing in the draft guidance around the notification process in respect of groups, even though we would expect that the great majority of businesses within the notification of uncertain treatment measure will be part of groups. Currently, the notification process as described seems to be more appropriate for smaller businesses, rather than large groups. What is currently proposed is likely to be very burdensome for many large groups.

8.4 To provide a little more detail, we would note the following:

- in a large group it is unlikely that each company within the group will have been set up with a Government Gateway account.
- this is particularly the case in some sectors, such as real estate, where businesses tend to operate through special purpose vehicles. This may give rise to a very large number of companies in respect of which corporation tax returns must be filed.
- it is common for the internal tax department of a large business to be set up as the representative for all group companies and this is the way the business interacts online with HMRC; there are not individual gateway accounts for each group company.

8.5 Will the proposal to use the Government Gateway account mean that each company in the group will have to file a notification form? It is likely that all group companies will follow the same tax treatment. Therefore, if this is the case, the same uncertain tax treatment may need to be reported for a number of companies. This means a number of identical forms (apart from tax reference and exact amount of tax advantage) could need to be submitted. This will be time consuming for the group and not give HMRC any additional information. Indeed, by having separate notification forms, HMRC will have more to deal with and may not be immediately aware of cumulative impact of the notifications. It would be much more straight forward if the notification process permitted a large business to send the CCM a form/letter including the required information and listing all the companies involved with amounts for each.

8.6 It may be that the Government Gateway account will be the most appropriate way of submitting notifications for those taxpayers within this measure who are not large groups. However it would be helpful to have an option of emailing the CCM with a form including the required information and doing this on a group basis. Similarly for groups that do not have a CCM, the notification could be submitted to a specified e mail address, possibly within the Customer Engagement Team that it is intended will provide support for those businesses within this measure that do not have a CCM.

8.7 Under UTT15200 (Notification deadlines) Please could the draft guidance consider how the rules apply to a large business which does not have coterminous CT and VAT accounting periods. It is not clear how the rules, which reference returns 'for financial years' (defined in paragraph 5(4)) would apply in these circumstances. For example, consider a company that has a CT year end of 31 March, and a VAT annual period which ends on 31 May. The annual adjustment for the VAT year ended on 31 May will be made in the following VAT quarter's VAT return – thus not until the VAT return in respect of the VAT quarter ended on 31 August. An adjustment in respect of the capital goods scheme for the VAT year ended on 31 May will not be made until the second VAT return following the end of the year – thus in the VAT return for the quarter to 30 November. Will these 'adjustment' VAT returns, which are for all other purposes relevant to the VAT quarter to which they relate, which will fall wholly outside of the company's financial year to 31 March, still be considered to relate 'to …a part of that financial year' for the purposes of paragraph 5(4)?

8.8 This would be on the basis that the last VAT quarter in the VAT year ending on 31 May relates, in part to the financial year ended on 31 March – there is an overlap of one month (March) in respect of the VAT quarter and the financial year. If that is the case, how will the notification deadline in paragraph 8(3)(b) apply for a

business that may have several points in time at which VAT adjustments are made? Which VAT return is the 'last relevant return' for the financial year ended on 31 March (that is to say the CT financial year)? This could be considered to be either the VAT return relating to the last quarter in the VAT year that overlaps with the financial year (the VAT return in respect of the quarter to 31 May), or the VAT return in which any general annual adjustments are made (the VAT return in respect of the VAT quarter to 31 August) or the VAT return in which capital goods scheme adjustments are made (the VAT return in respect of the quarter to 30 November)? Or, are all of these dates potentially relevant depending on whether adjustments are required? It is also not clear how the rule determining the relevant period (in paragraph 14) would apply in these circumstances. Paragraph 14(1)(c) says that the relevant period relates to the last day of the last prescribed accounting period falling wholly within the financial year 'for which' the return is delivered to HMRC.

8.9 In the circumstances described above, that would seem to make the relevant VAT quarter – the prescribed accounting period – the quarter ended on 28 February (as this is the last VAT quarter that falls wholly within the financial year to 31 March) and, therefore, the relevant period would be the 12 months to 28 February. This is mentioned in the guidance at UTT14400 (Relevant Period). However, this would mean that the adjustments which are made after the end of the annual VAT period are not taken into account until the subsequent relevant period? Without clarity in the guidance, taxpayers (and advisers) may be confused whether the obligatory VAT adjustments in later VAT periods become part of the next CT financial year, even though they mainly relate to transactions completed the financial year before. These complications appear to arise from starting with the rules devised in relation to corporation tax accounting periods etc and seeking to apply them to VAT. Please could HMRC consider this and clarify.

8.10 Please could HMRC re-consider **Example Five – Change of company year-end (financial year is more than 12 months**. We do not see how this example can be correct. It suggests that, where a business has an accounting period of more than 12 months, there are two deadlines for notification of uncertain tax treatment. This seems (a) to be impossible from a practical sense – the business may not have their accounts and corporation tax return ready in time to form a view for the first 12 months and (b) incompatible with the deadline set by FA 1998 Schedule 18 paragraph 14 for the submission of the return. Paragraph 14(1)(b) says that where the company prepares accounts for a period exceeding 12 months but less than 18 months then there is only one filing deadline – which is set by reference to the end of the whole period, although two returns are needed (one for the first 12 months and one for the remaining period). We suggest that HMRC should amend the legislation and guidance so that the deadline for the notification of the uncertain tax treatment matches that of the corporation tax return, that is to say matches FA 1998 Schedule 18 paragraph 14. The guidance does not cater for paragraphs 14(1)(c) or (d) either, or allow for later submissions. Further, FA 1998 Schedule 18 paragraph 19 says that a company is not penalised for late submission if Companies' House delays their accounts filing deadline to later than the corporation tax return deadline, and the company submits their corporation tax return within the revised Companies House deadline. Some corporates used this more than usual in the last 12 months or so due to the impact of the pandemic. We suggest that the deadline for notification of an uncertain tax treatment should be similarly moveable.

8.11 Paragraph UTT15310 provides some guidance in relation to the general exemption from the requirement to notify an uncertain tax treatment. As a general point, we would prefer to see all the guidance about the general exemption in one place and suggest that the paragraphs about exemptions in UTT18000 (and UTT18200 in particular) would be the most appropriate place to deal with this exemption. As mentioned at paragraph [11.10] below, there are also some comments about the general exemption under UTT19400 that should also be moved to paragraph UTT18200, as they do not seem relevant to the assessment of penalties.

8.12 In relation to the draft guidance that is currently in UTT15310 (General Exemption) we do not think that where it says '*The exemption does not therefore apply if [the information] is …notified in writing by another*

company…' is consistent with sub-paragraph 16(2)(b) of the legislation which refers to 'dealings with HMRC …in respect of the company or partnership'. We suspect what is meant is that HMRC are not expected to guess from information provided by Company A that the same fact pattern also applies to Company B. However, if Company A expressly states that it is disclosing on behalf of itself and Company B, this should satisfy the test in the legislation. HMRC should also clarify that disclosure by an agent satisfies the test. With regard to dealings of groups of companies, we also refer to our comments above around the notification process, which, as currently envisaged, will be very cumbersome.

8.13 More generally, some of the statements under UTT15310 do not sit well with the statement under paragraph UTT18200 that says that '*If a business provides information under these other regulatory requirements, they will be exempt from making a further notification.*' More clarity is required around the extent to which the information provided under these other regulatory requirements must make clear the 'relevance' of the information to the notification of uncertain tax treatment measure in the manner suggested in UTT15310. The legislation itself does not necessarily result in information that is provided under the regulatory requirements in sub-paragraph 16(2) satisfying the general exemption in sub-paragraph 16(1). Sub-paragraph 16(2) merely says that the information is 'available' to HMRC. The statement in UTT18200 would suggest that HMRC consider that this information that has been provided in this way does satisfy the tests set out in UTT15310 as to what 'available' to HMRC means, however this should be clarified.

9 UTT18200 - General Exemption

9.1 We welcome the general exemption in paragraph 16 of the draft legislation which applies where '*it is reasonable for the company or partnership to conclude that HMRC already have available to them all, or substantially all, of the information relating to that amount that would have been included in the notification if it had been required to be given*'. It has been discussed throughout the consultation process that an exemption along these lines is necessary in order to reduce the administrative burden, and minimise the duplication of effort, that will fall on large businesses. As noted in the guidance, it is common for large businesses to engage with HMRC on areas of uncertainty, most usually through, CCMs.

9.2 The draft guidance does not currently deal with how large businesses that do not have a CCM will be able to avail themselves of this general exemption. The policy paper on this measure, published alongside the draft legislation in July, considering the impact of this measure on large businesses, states:

'Customer experience is expected to remain broadly the same because taxpayers with a Customer Compliance Manager or who are open and transparent with HMRC on uncertain tax issues will be exempt from notifying where they have already notified.

For taxpayers without a Customer Compliance Manager, HMRC will utilise their existing Customer Engagement Team to provide a structured opportunity to discuss tax uncertainties, so that they can also benefit from this exemption'.

9.3 The draft guidance does not provide any detail around the 'structured opportunity' that might be provided by the Customer Engagement Team to replicate the experience of having a CCM for those large businesses that do not have one. It is difficult to see how the current Customer Engagement Team system could replicate having a CCM, not least because engagement with the team currently starts by the business having to apply for assistance (Get help with a tax issue as a mid-sized business - GOV.UK (www.gov.uk)). This facility was intended to allow taxpayers to have access to someone in HMRC who could assist them short term with for a specific purpose (for example, to discuss an intended approach to a transaction before a deal is completed). Discussions around uncertain tax treatments may arise over a longer period and it is very important for businesses to know how this will be managed effectively. The guidance should be expanded to explain how

the existing Customer Engagement Team will be available to large businesses without a CCM, to ensure that these large businesses can benefit from the general exemption in a manner that is comparable to large businesses with CCMs. The guidance should provide details of the process and framework for large businesses without a CCM to discuss tax uncertainties with the Customer Engagement Team and the process for recording notifications. In particular it would be useful to know:

- what criteria HMRC intends to use to ensure parity of treatment for all large businesses,
- how HMRC intend to resource the additional support required by large businesses without a CCM, and
- how HMRC intend to document and record communications with large businesses without a CCM, so that where HMRC have been notified of an uncertain tax position, there is a clear record of this.

9.4 In our comments on the draft legislation, we suggest that sub-paragraph 16(2)(a) should include a provision confirming that information provided to HMRC in respect of an application for approval of a partial exemption special method (under paragraph 102 of the VAT Regulations 1995) should be taken to be negate the requirement for a notification in respect of an uncertain tax treatment that arises as a result of a changed, or proposed to be changed, partial exemption method. This is a particularly difficult area for taxpayers that generates uncertainty around VAT treatment for some considerable time, as it often takes many months (often as many as 18 months, and in some cases even longer than this) to obtain the approval from HMRC in respect of a new or changed partial exemption special method. We suggest that once a business has contacted HMRC about a new or changed partial exemption special method HMRC is 'put on notice'. HMRC should be able to follow up with regard to any questions as to any uncertain tax treatment (either as a result of the old partial exemption method, or the new one being applied in certain circumstances prior to approval being given) which may result from the definition in this legislation. As such further notification from a business about these tax treatments should not be necessary or required. In any event, whether or not the legislation can be amended to include this, it would be helpful if the guidance could specifically include confirmation that HMRC consider that information provided by a company in an application for approval of a partial exemption special method is considered to be available to HMRC for the purposes of sub-paragraph 16(1). In circumstances where a large business has written to HMRC setting out its proposed partial exemption method, we suggest that it is reasonable to assume that HMRC have all information available to them in respect of the proposed tax treatment and that a notification under this measure would not also be required and it would be useful if the guidance could confirm that HMRC agrees.

9.5 The statement in the draft guidance which says that '*The discussion should include all the information that would otherwise be provided in a notification …*' (emphasis added), is not reflective of the legislation. The legislation requires 'all, or substantially all, of the information'. As discussed above in relation to the list of regulatory requirements in sub-paragraph 16(2), the draft guidance should discuss what HMRC perceive to be 'substantially all' for these purposes. It may not be possible to provide all of the information, depending on the timing of the earlier discussions with HMRC. For example, the date of the transaction will not be known if discussions occur before the transaction has occurred. How will these inevitable discrepancies around the 'level of detail' and information that can be provided because of the timing of the discussions be dealt with? This point is also relevant in relation to the provision of information under the regulatory requirements listed in sub-paragraph 16(2). Are taxpayers able to assume that information provided under the listed regulatory requirements will provide 'all, or substantially all, of the information relating to' the uncertain tax treatment that is required by sub-paragraph 16(1)? The statement under UTT18200 that says that '*If a business provides information under these other regulatory requirements, they will be exempt from making a further notification.*' seems to confirm this, but it could be clarified.

9.6 The draft guidance, at paragraph UTT18200 says '*Notification would still be required if the entity treats the transaction contrary to HMRC's recommendation, as this would satisfy paragraph 9(3).*' (emphasis added). We are not clear as to what recommendation is being referred to. Is it a recommendation around the tax treatment that is made by the CCM during the business's engagement on the relevant tax treatment? Or is it a reference to the 'recommendation', if there is one, that is apparent from HMRC guidance or other published, generally available material? Either would give rise to a 'known' HMRC position, hence, we assume, the reference to the notification criteria in sub-paragraph 9(3). However, in either case, we do not agree that a notification is required if the business has engaged with its CCM, and provided HMRC with the relevant information, including its proposed tax treatment, and then goes ahead with the transaction 'contrary to HMRC's recommendation'. The general exemption in paragraph 16 of the draft legislation applies in respect of all notification criteria: thus if the information has been provided to HMRC, no notification is required, assuming that the transaction is carried out in accordance with the information provided to HMRC. In addition, if HMRC were correct in suggesting that notification would still be required in these circumstances, this could drive behaviour in one of two ways, either of which we expect would not be welcomed by HMRC:

- a taxpayer may see little benefit in providing the information on a real time basis if subsequently, as a result of HMRC disagreeing with the proposed treatment, the exact same information needs to be provided again as a notification, or
- a taxpayer might seek more non-statutory clearances than previously.

9.7 Similarly, we would welcome clarification around the guidance in the following paragraph that discusses non-statutory clearances. It does not seem to us to be relevant whether or not HMRC agrees or disagrees with the proposed treatment (thus creating a 'known' position), as the provision of information to HMRC within the clearance process invokes the general exemption which applies in respect of all of the notification criteria.

9.8 The final paragraph under UTT18200 about collective investment schemes that satisfy turnover and balance sheet criteria would sit better in the earlier guidance around Entities in Scope in UTT12300.

10 Assessing a Penalty – UT19000

10.1 It is not clear from the comments under UTT19100 (Circumstances in which a penalty is chargeable) whether a company can have multiple penalties with respect to the same tax and the same accounting period: for example where the 'relevant tax' is corporation tax and there is an uncertain tax treatment in relation to (say) interest on borrowed monies and a separate, and wholly unrelated, uncertain tax treatment in relation to R&D tax relief. Is there one penalty because both uncertain tax treatments relate to corporation tax or two penalties, assuming that neither position is notified? Sub-paragraph 8(4) of the draft legislation refers to a single form notifying multiple amounts in relation to a relevant return, but could this be read as one notification document containing multiple sub-paragraph 8(1) notifications. However paragraph 20 simply refers to a paragraph 8 notification leaving it ambiguous as to whether 'notification' means a sub-paragraph 8 (1) provision of information or a sub-paragraph 8(4) single document. We would welcome clarity on this point.

10.2 Similarly, the draft guidance is not clear as to what the penalty is where there is more than one failure with regard to a notification of uncertain tax treatment. For example, suppose a company submits their notification of uncertain tax treatment late (as in Example One under section 1 (**Not notifying within the time limit**)) and then, during a corporation tax enquiry, HMRC realises that the notification also missed out an uncertain treatment (that is to say its notification was incomplete per section 3 (**Submitting an incomplete**

notification). It would seem from the legislation that there cannot be a second penalty because the company has already been penalised for submitting the notification late. Please can HMRC clarify?

10.3 In UTT19130, we suggest that Example 1 should say that HMRC becomes aware of it on 15 not 30 January (final sentence), given the date in the previous sentence for the submission.

10.4 The draft guidance includes a section (UTT19200) on reasonable excuse. Following the Powers and Safeguards Review (PSR) of post-2012 powers undertaken by HMRC's Powers and Safeguards Evaluation Forum, HMRC committed to 'review and update guidance to clarify the range of factors that may contribute to reasonable excuse, taking account of an individual's personal circumstances' (commitment 16). We understand that HMRC are well advanced with a complete re-draft of its guidance on reasonable excuse, and that the PSR team are hoping to publish the new guidance by the end of September at the latest. One of the main changes to the guidance is to ensure it reflects the Upper Tribunal decision in *Christine Perrin v The Commissioners for HM Revenue and Customs* [2018] UKUT 0156 (TCC). However, it appears that the writer of this draft guidance may not be aware of this project. We suggest that any guidance around reasonable excuse in relation to the notification of uncertain tax treatment should be linked to the new guidance produced by the PSR team in due course. Notwithstanding this, we have some comments on the draft guidance dealing with reasonable excuse.

10.5 We do not think that the last sentence UTT19220 is correct in respect of partnerships, as only the representative member can submit the notification of uncertain tax treatment. In addition, this paragraph seems to reflect a general assumption that all large corporates have big in-house tax teams with lots of people who are all sufficiently knowledgeable to step in if the tax director is suddenly incapacitated or something. That may not be the case for many businesses and the perception is unhelpful. The factual position may well be more akin to the Example in UTT19270. We would prefer to see the last sentence under UTT19220 removed.

10.6 The paragraphs under UTT19250 discuss insufficiency of funds and whether or not this is 'unforeseeable', suggesting that insufficiency of funds must be unforeseen/unforeseeable in order to constitute a reasonable excuse. This is out of date law. HMRC's been criticised in tribunal for relying on that argument, which derives from a dissenting judgement in the Court of Appeal case of *C & E Commrs v Steptoe* STC 757 and was expressly contradicted by the view of the majority. As per paragraph [10.4] above, this may be because the HMRC team writing this guidance has not liaised with the PSR team working on the new reasonable excuse guidance. However, in any event, we draw HMRC's attention to *ETB (2014) Ltd v HMRC* [2016] UKUT 424 (TCC) which confirms that the test is not whether the event is unexpected, unusual, unforeseeable or beyond the taxpayer's control. Instead, the question is whether the insufficiency of funds was reasonably avoidable, for example by the exercise of reasonable foresight and due diligence. See, for example, paragraph 15 of the judgment in *ETB*. The wording about 'insufficiency of funds' not being a reasonable excuse for the sort of penalties being considered in that case is identical to that in the draft notification of uncertain tax treatment legislation, so we suggest that *ETB* should apply.

10.7 The penalty assessment (UTT19310) should be sent to the agent as well as the taxpayer.

10.8 We refer to the examples in paragraph UTT19320. Example One is not relevant to this part of the guidance, as it is dealing with the fact that there will be a penalty, not with the time limits for the assessment of that penalty. Similarly, Example Two is incomplete, in that it does not specify the time limit on HMRC to assess a penalty.

10.9 Paragraph UTT19330 says 'A penalty payable by a company is enforceable as if it were corporation tax charged in an assessment. A penalty payable by a partnership is enforceable as if it were income tax charged in an assessment.' This is not reflected in the legislation, which is silent and/or somewhat different (see paragraph

25 of the draft legislation). We suggest that either the guidance or the legislation needs to be changed. FA 2008 Schedule 41 paragraph 16(3) could be used if HMRC wish the position to be as per the draft guidance.

10.10 We suggest that the paragraphs under UTT19400 should be moved to either paragraph UTT15310 or UTT18200 (see our comments in paragraph [9.11] above regarding this), so that the guidance in relation to the general exemption is dealt with in one place. The comments here at UTT19400 do not seem to be relevant to the assessment of penalties.

10.11 The guidance on this measure should include commentary around how this compliance measure interacts with the rules dealing with discovery assessments. In our comments on the draft legislation we have suggested some changes to address this point and provide clarity for taxpayers.

10.12 We note that the guidance at UTT19500 relating to appeals against penalties refers to appeals to the First-tier Tribunal. It does not refer to statutory reviews. Is it HMRC's intention to prevent corporates using statutory reviews as envisaged by Taxes Management Act 1970 ss49A-49G? HMRC statistics demonstrate that statutory reviews can be an efficient, cost effective way to resolve reasonable excuse based appeals. If statutory reviews are to be permissible, the guidance should be amended to reflect this? If statutory reviews are to be permitted, the paragraph 24 of the draft legislation would also need amending.

11 Acknowledgement

11.1 We would be grateful if you could acknowledge safe receipt of these comments.

The Chartered Institute of Taxation
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