Chartered Institute of Taxation

Excellence in Taxation

Digital reporting and record-keeping for business: income tax
Draft legislation published on 31 January 2017
Response by the Chartered Institute of Taxation

1 Introduction

1.1 We are pleased to provide our comments on the draft Finance Bill clauses published on 31 January entitled 'Digital reporting and record-keeping for business: income tax'.

1.2 As an educational charity, our primary purpose is to promote education in taxation. One of the key aims of the CIOT 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.

1.3 Our objectives for the tax system include; a legislative process which translates policy intentions into statute accurately and effectively, without unintended consequences; and greater simplicity and clarity, so people can understand how much tax they should be paying and why. We are concerned that the draft proposals endanger those key objectives.

2 Executive Summary

2.1 By delegating key details to secondary legislation, and using the negative procedure (rather than the affirmative procedure) it is more or less inevitable that they will receive little if any Parliamentary scrutiny[1]. At some places, it appears that material delegated to secondary legislation can then be further delegated to directions and

[1] See part 2 in particular of the Commons Library Briefing on Statutory Instruments December 2016 http://researchbriefings.files.parliament.uk/documents/SN06509/SN06509.pdf

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notices. This is giving HMRC extremely wide powers to make provisions without any scrutiny at all. This is unacceptable.

2.2 The primary legislation is prescribing only the barest of parameters for what will be contained in regulations. Therefore it is very difficult to make constructive comments about it.

2.3 We are also concerned at the limited consultation being undertaken on the legislation. The small amount of legislation published on 31 January was only open for consultation for one month, much shorter than under agreed consultation principles.

2.4 We are concerned that the requirements of Making Tax Digital (MTD) will come into force before there has been adequate time to prepare and consult on the legislation necessary to introduce MTD. We remain of the view that the timeframe for mandating MTD should be extended for at least a year, so that the fullest consultation and scrutiny of both primary and secondary legislation, can take place.

3 Comments on the legislation

3.1 We consider that the details currently delegated to secondary legislation, in the following items (as a minimum), should actually be set out in primary legislation:

- Paragraph 2 (4)
- Paragraph 5 (4)
- Paragraph 7 (1)
- Paragraph 8 (1)
- Paragraph 8 (6)
- Paragraph 9 (1)
- Paragraph 9(5)
- Paragraph 10 (1)
- Paragraph 11 (2) (a) and (e)
- Paragraph 11 (3)

3.2 Paragraph 1 (1) - persons

Digital reporting and record-keeping does not apply to a person who is not within the charge to income tax, so what we think this means is that, if you are specifically exempt from paying income tax under other (non-MTD) legislation then you are not within the Schedule.

Non-resident companies with rental income are currently subject to income tax, although the Autumn Statement proposed making them subject to corporation tax on their income (from a currently unspecified date). We have heard that HMRC have said that such companies would not be brought within MTD for income tax. Of course, if these companies were subject to corporation tax from April 2018 the issue would go away, but this has not been announced.

How does the rule that the new obligations do not apply to a person who is not within the charge to income tax interact with the new £1,000 trading and property allowances?

3.3 Paragraph 2 (1) (a)

Is this exemption for trustees of a charitable trust supposed to exempt all charities? If so, does it? What about charitable companies, Royal Charter bodies etc – are they all covered?

3.4 Paragraph 2 (4)

Provision must be made for agents to make or withdraw elections on behalf of the taxpayer.

3.5 Paragraph 3 (3) - Partnerships

See 2.3 above – equally applicable for partnerships as for persons.

3.6 Paragraph 4 (1)

As drafted, if a partnership has only in part an excluded activity it would seem that it is within the requirement for all (ie including the excluded) activities. This appears to be different from the requirement for individuals in 2(2). This will need addressing if other activities (such as those of an insolvency practitioner) are treated as excluded activities, otherwise notwithstanding the exclusion, partnerships which include an insolvency function will still be required to comply in full.

3.7 Paragraph 5 (3) – Nominated partners

Why should a notice of nomination have to be given to HMRC? Why should HMRC itself be able to determine the nominated partner? This area needs proper discussion.

3.8 Paragraph 5 (4)

Provision must be made for agents to make or withdraw nominations on behalf of the taxpayer.

3.9 Paragraph 7 (1) – periodic updates

After the words '*specified information about the business…..*' we think the following words are needed - '*as may reasonably be required for the purpose of xxxxxx'*. If it does not have to be reasonably required then anything can be put in the regulations. It also needs to state the purpose of the update, otherwise it will be impossible for the courts to say if what is required is reasonable. This should be made clear in the legislation, as it is for self-assessment in Taxes Management Act (TMA) 1970 section 8(1).

'Electronic communications' is not defined and there will need to be clarification as to what this means so that taxpayers can understand what is required of them.

3.10 Paragraph 7 (2)

The words 'any information' and 'financial information' both need to be clearly defined. As it stands, they are unnecessarily wide, especially without 'purpose' or 'reasonably required'.

'Profits, losses or income' – but not expenses?

‘Receipts and expenses’ is an odd combination of terms. Do they mean ‘receipts and payments’ or ‘income and expenses’?
Should this paragraph really state, ‘relevant to calculating profits, losses, income or expenses of the business, including information about receipts and payments’?

3.11 Paragraph 8 (1) – end of period statement

After the words ‘*specified information about the person’s business…..*’ we think the following words are needed - ‘*as may reasonably be required for the purpose of xxxxxx’*. If it does not have to be reasonably required then anything can be put in the regulations. It also needs to state the purpose of the end of year statement, otherwise it will be impossible for the courts to say if what is required is reasonable.

‘Electronic communications’ is not defined. It needs to be.

The title needs to refer to ‘persons’ only as partnerships are dealt with in paragraph 9.

3.12 Paragraph 8 (2) – relevant period

What happens with accounting periods exceeding 12 months / less than 12 months?

3.13 Paragraph 8 (3)

See 2.8 above, ‘any information relevant’ is unnecessarily wide, especially without ‘purpose’ or ‘reasonably required’.

3.14 Paragraph 8 (4)

This paragraph appears to be about authorising (but not requiring) the provision of voluntary information at the same time as information about a person’s business in order to establish their income tax liability for the year.

However, capital gains/losses are not mentioned. This is therefore different to the self-assessment requirements in TMA 1970 s.8. Why is this?

If the deadline for submitting the end of year statement is going to be the earlier of 10 months after the end of the accounting period or 31 January following the year of assessment, then businesses with accounting periods ending early in the year of assessment (eg 30 April) will not be able to supply other information relevant to ascertaining their tax liability for the year because it will not be available within 10 months (ie by 28/29 February). In these situations, since the provision is authorising (but not requiring) that additional information how else will it be provided? We think the use of ‘10 months after the end of the accounting period’ needs to be reconsidered and potentially abolished, while income tax remains calculated on an annual basis.

Will there also be similar legislation for Class 4 national insurance contributions?

3.15 Paragraph 8 (6)

Will the wording of the declaration be the same as the declaration currently required on the SA tax return? The statutory backing for that is in primary legislation – TMA 1970 section 8(2). Why not the same here?

It is important that the regulations state that, as for iXBRL, the person submitting the statement, if not the taxpayer, is confirming that the taxpayer has confirmed it is correct and complete ie it is not for the submitter to state that.

3.16 Paragraph 9 (1) – partnership end of period statement

After the words '*specified information about the partnership's business…..*', we think the following words are needed - '*as may reasonably be required for the purpose of xxxxxx'*. Again, if it does not have to be reasonably required then anything can be put in the regulations. It also needs to state the purpose of the update, otherwise it will be impossible for the courts to say if what is required is reasonable.

As above, 'electronic communications' is not defined and there will need to be clarification as to what this means so that taxpayers can understand what is required of them.

3.17 Paragraph 9 (2)

The reference to 'information' about the persons who have been partners is rather vague. This is either unnecessary or needs to be reworded so it is more in line with TMA 1970 section 12AA. If not then it should state the purpose and include the words 'reasonably required'. Otherwise this could be demanding all sorts of information.

3.18 Paragraph 9 (3) (a)

See 2.8 above, 'any information relevant' is unnecessarily wide, especially without 'purpose' or 'reasonably required'.

3.19 Paragraph 9 (3) (b)

'Any information relevant' is very wide. Surely this needs to be much more closely defined.

3.20 Paragraph 9(5)

Will the wording of the declaration be the same as the declaration currently required on the SA tax return? The statutory backing for that is in primary legislation – TMA 1970 section 12AA (6). Why not the same here?

It is important that the regulations state that, as for iXBRL, the person submitting the statement, if not the taxpayer, is confirming that the taxpayer has confirmed it is correct and complete ie not for the submitter to state that?

3.21 Paragraph 10 (1) – record keeping

Would consider this should reflect the words of TMA1970 section 12B(1)(a). This is crucial; otherwise there is a risk of inconsistency and dual purpose.

3.22 Paragraph 10 (2)

Why does this not follow the existing TMA1970 section 12B(1)(a) wording for the records which must be kept for the purpose of making returns? The proposed wording of '*any records the Commissioners consider relevant'* is exceptionally and unnecessarily wide.

Surely the 12B wording of '*requisite for the purpose of enabling him to make and deliver a correct and complete return for the year or period'* is perfectly adequate and is understandable. Requiring a business to keep '*any records the Commissioners consider relevant'* will mean the business has to second guess in advance what HMRC might want when it sets up an accounting system.

3.23 Paragraph 10 (3)

This indicates that the new record keeping obligations will be in addition to, and not in place of, the existing obligations in section 12B. We understand there needs to be new legislation to enact the mandatory keeping of a business' accounting records in digital format but why go further? Section 12B by its own definition is 'requisite'. Further consultation on this would be welcome.

3.24 Paragraph 11 (2)

An unprecedented level of very wide powers are being taken here by the use of regulations.

11 (a) There is often a disconnect between HMRC's knowledge and understanding about the accounting systems that businesses keep, and their adequacy in practice. The recent discussions and concessions around spreadsheets demonstrates this disconnect, yet it was only after detailed discussions that the conditions regarding spreadsheets have been relaxed. It is not acceptable, therefore, for HMRC to be able to define these matters in regulations, which will not have full Parliamentary scrutiny.

11 (e) This legislation is effectively saying that if HMRC do not like what a taxpayer has submitted they can reject it (and presumably be entitled to issue a failure to make a submission penalty). Surely anything like that must be in primary legislation, with adequate notice, to comply with human rights legislation?

11 (g) Is this talking about agents submitting returns, or the intermediary software? There must be provision for agents to do this, or at least not legislate that they cannot retain the records for clients or make the submission on their behalf.

3.25 Paragraph 11 (3)

This paragraph is using very wide and vague wording for what can be put in regulations. This should be much clearer in the primary legislation.

3.26 Paragraph 11 (4)

This is very odd wording. Surely it is up to the taxpayer whether they want to use an intermediary/agent. This makes it sound as if HMRC can choose or require it.

3.27 Paragraph 11 (5)

We need to understand what 'a specific or general direction given by the Commissioners' means. What scrutiny will there be of such directions? May we request that CIOT review the draft directions before they come into force? It is not unknown for some previous directions (eg iXBRL and IHT) to have been issued in final form with immediate effect and to be unworkable.

3.28 Paragraph 11 (6)

It seems quite unnecessary to specify in regulations that records must meet '*standards of accuracy and completeness set by specific or general directions'*. Surely if the return is accurate and reflects the records that is enough.

We do not understand why regulations are needed to provide '*that failure to meet those standards may be treated as a failure to provide the information or keep the records, or as a failure to comply with the requirements of the regulations'.*

Why is this needed in addition to existing section 12B record keeping requirements or other terms above?

3.29 Paragraph 12 – exemptions: digitally excluded

This paragraph does not contain anything about an appeals process.

It seems very strict to require that the digital exclusion condition has to be met by every partner in a partnership.

3.30 Paragraph 14 (2) – supplementary

This paragraph specifies that regulations may provide for matters to be specified by the Commissioners in accordance with the regulations. Does this mean that some of the material delegated to regulations can be further delegated to directions and notices? If so, we are concerned about the appropriateness of this.

3.31 Paragraph 14 (3)

This paragraph is specifying which matters may be specified only by regulations (and not by the Commissioners). But what about the matters that are being permitted to be specified by the Commissioners? Surely they should all be in primary legislation or at worst secondary legislation. Anything else would be legislation by HMRC rather than by Parliament.

3.32 Paragraph 14 (4)

This specifies that the legislation will not apply before 2018/19, but it allows for it to apply later than that. This is sensible as it allows for the deferral of the MTD requirements.

3.33 Paragraph 14 (6)

This states that all regulations under this Schedule will be subject to the negative resolution procedure. We are gravely concerned therefore that the regulations will get little or no Parliamentary scrutiny / debate. For such an important change to the tax system the draft regulations should be subject to the affirmative resolution procedure, if not put in primary legislation.

4 Acknowledgement of submission

4.1 We would be grateful if you could acknowledge safe receipt of this submission.

5 The Chartered Institute of Taxation

5.1 The Chartered Institute of Taxation (CIOT) is the leading professional body in the United Kingdom concerned solely with taxation. 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. 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.

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. The CIOT's comments and recommendations on tax issues are made in line with our charitable objectives: we are politically neutral in our work.

The CIOT's 18,000 members have the practising title of 'Chartered Tax Adviser' and the designatory letters 'CTA', to represent the leading tax qualification.

The Chartered Institute of Taxation
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