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Notification of uncertain tax treatment by large businesses – second consultation

Response 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 We note the changes to the proposed measure for notification of uncertain tax treatment by large businesses reflected in the second consultation document and appreciate that these changes mean that the measure in itself is now more objective. But there remains room for considerable improvement and we are concerned that the measure will still impose significant compliance costs on all large businesses for very uncertain benefits for the Exchequer and HMRC.

1.3 We remain unconvinced that this measure will achieve the stated policy aims effectively or proportionately. We are not convinced that legislation is necessary to achieve the stated policy aims. There are other things that could be done, much of which will be needed in any event if this compliance measure is to be capitalised on; and/or is to achieve its intention of not duplicating a requirement to disclose matters already brought into discussion with HMRC and otherwise not adding to the burdens of the compliant. It is not clear to us why these other things could not be done, without the additional compliance burdens that legislating for this measure would impose, to achieve similar or greater benefit.

1.4 The triggers require a significant amount of further work in order to ensure that these are sufficiently clear and objective, as well as removing some elements in order to lessen the amount of overlap.

1.5 The exception from the requirement to notify in respect of uncertainties that HMRC are already aware of will have to be set out very clearly in legislation in order for large businesses to be able to rely on it and achieve the policy aim of containing the increased compliance burden. A number of questions in relation to its potential application in practice must be resolved and clarified.

1.6 In addition to the significant compliance burden on large businesses, we anticipate that significant additional resource will be required for HMRC. However, that might be needed in any event to address this area of the tax gap more effectively, in the way suggested in para 1.6 above, and may well be a worthwhile investment.

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 Introduction

3.1 We refer to the second consultation document on the proposal for Notification of uncertain tax treatment by large businesses published on 23 March 2021 and also to the discussion we had with HMT and HMRC on this proposal on 5 May 2021. Our comments below reflect our understanding of the proposals following those discussions.

3.2 Our stated objectives are for a tax system that includes a legislative process which translates policy intentions into statute accurately and effectively, without unintended consequences. We also aim for greater certainty, so businesses and individuals can plan ahead with confidence and a fair balance between the powers of tax collectors and the rights of taxpayers (both represented and unrepresented), with a minimum of bureaucracy.

3.3 We note the changes to the proposed measure for notification of uncertain tax treatment by large businesses reflected in the second consultation document. We appreciate that these changes mean that the measure in itself is now more objective, although there is room for considerable improvement. We welcome the reduced scope to corporation tax, VAT and income tax (including PAYE). However, the measure will still impose significant compliance costs on all large businesses for very uncertain benefits for the Exchequer and HMRC.

3.4 The detailed proposals still lack clarity, both with regard to how they are expected to bring about the stated intended outcomes and as to their practical implementation and impacts. We also welcome, therefore, the confirmation during our discussions that the government recognises that there is still a significant amount of work required in relation to several areas of this proposal in order to achieve better focus and targeting of the measure. In particular, we discussed the considerable overlap between the triggers, as well as those that lack clarity and objectivity. The triggers should be tightened up and the number of these reduced. In addition, the proposed exception in respect of uncertainties that HMRC already knows about – an exemption which is key to the vision of the intended outcome of the proposals set out in section 2 of the second consultation

document - needs to be more fully thought through to minimise the compliance burden so far as possible. We are very willing to engage in further discussion to assist with this, although it is fair to say that we remain unconvinced that the main detailed features of this measure will achieve the stated policy aims effectively or proportionately.

3.5 We welcomed the delay announced in November 2020 of the delay of the introduction of this measure to April 2022. However, April 2022 remains a challenging timetable for the implementation of this measure given the work that is still required to ensure it is practicable, and because businesses are likely to still be facing a very difficult economic situation.

4 Policy objectives

4.1 The policy objectives of this measure are summarised in paragraph 2.14 of the second consultation document, which states:

'…. this measure is intended to help reduce the legal interpretation portion of the tax gap …. The aim of the measure is to identify and clarify uncertainties earlier than they would otherwise be identified (if at all) and identify businesses that our pushing the legal boundaries, ….'.

We do not think that the case has yet been made to demonstrate that the measure will achieve these policy aims or be effective of (and efficient at) doing the job required of them from HMRC's perspective. Broadly, it seems to us that this measure will be wholly inefficient, primarily because the compliance burden on large businesses and the additional administrative resource required by HMRC will be disproportionate to any benefit, but also because similar outcomes could be achieved within the existing tax administration framework by steps which it seems to us might well be worthwhile and effective in their own right.

4.2 We understand that the reduction of the legal interpretation tax gap is not the full extent of the policy intention. The measure is also aiming to address the challenge of encouraging transparent and cooperative compliance behaviour from the small pool of taxpayers that are resistant to openness with HMRC, and we understand that it is this population that it is primarily aimed at (and that the implications of this behaviour are not confined to the legal interpretation part of the tax gap). Whilst we understand this policy aim, we have not seen any evidence that leads us to a conclusion that this measure will change the overall behaviour of those that do not wish to act in a compliant and co-operative manner with HMRC, either at all or in a way that reduces the 'legal interpretation' tax gap attributable to these businesses.

4.3 Overall, the measure will certainly give rise to additional compliance costs for all large taxpayers but the benefits of it are difficult to assess in terms of either of the policy aims – that is to say encouraging compliance from those businesses pushing legal boundaries and/or reducing the legal interpretation tax gap.

4.4 The measure will not build on the collaborative compliance relationship that the government has sought to develop with large business over its recent policy initiatives. There have been a raft of measures over the last decade or so to increase compliance, including the Senior Accounting Officer rules, business risk review (BRR and subsequently BRR+) and the requirement to publish a tax strategy. Compliant businesses have taken these on board and can understand what these measures are trying to achieve. Unless the targeting of these proposals can be improved further, these measures risk principally resulting in additional compliance cost and frustration for compliant businesses in having to comply, contrary to the intention of focussing on non-compliant businesses on whom we suspect there risks being little or no impact.

4.5 The potential downsides of this measure can be minimised by very careful focussing of the definition of uncertain tax treatments (discussed in paragraph 6 below in relation to the proposed triggers) and also

ensuring that the general exclusion where HMRC are already aware of the uncertainty (discussed in paragraph 5 below) works as well as possible. However, the compliance burden on businesses should not be underestimated. Even for compliant businesses, this measure will introduce a significant level of duplicated effort.

4.6 It is not realistic to suppose that a business will be able to review the triggers and conclude that they are comfortable that either uncertain tax treatments would not arise for them or that they would always raise any such matters with their Customer Compliance Manager (CCM) (if they have a CCM) and that, as a result, no further work is required in respect of this new measure. Rather, whilst a business may discuss an uncertain tax treatment (as defined) as part of its ongoing liaison with their CCM they will still need to go through the process of (a) considering if they need to make a notification of that uncertain tax treatment and (b) preparing the notification. In doing (a) they will need to review all their submissions whether clearance applications, notes of discussion, correspondence etc on all the issues relevant to the tax in question, and then work out what else there is to notify. For a large business that is conscientious in its approach, this will be a substantive process – particularly given the fact that in all likelihood not every detail will have been raised with HMRC in advance of the time at which a notification would be required.

4.7 In addition, there are a number of reasons why compliant business may not have already raised the uncertain tax treatment with their CCM (even assuming that they have one), despite being open and transparent in their dealings with HMRC. These include:

- the tax function was not aware of the business event which gives rise to the uncertain tax treatment at an early stage; this measure is aimed at deliberate uncertainty – but not non-deliberate uncertainty;
- limited resource of the tax function – deciding whether or to speak to CCM depends not only on whether this is an uncertain tax treatment. It will also depend on the level of relevance of the issue to business, which in turn will depend on the size of the issue and the size of the business; or
- limited resource of the CCM and expected response from the CCM - it is possible that this requirement to notify uncertain tax treatments may actually delay the time at which a business tells HMRC about a tax position. Businesses will focus on the most important positions in live/ongoing discussions with their CCM. This will be particularly the case if it is not expected that the CCM will be able to provide a response which gives the business certainty in relation to the issue in any event (this point is discussed further in paragraphs 4.16 to 4.21 below with suggested alternative steps that HMRC could take to address the perceived problem).

4.8 **Question 1: Do you support the government taking action to close the legal interpretation portion of the tax gap?**

4.9 We support the government taking action to close the legal interpretation portion of the tax gap. However, we are not convinced that this proposed legislation is necessary to achieve this. There are other things that could be done, some of which will be needed in any event if this additional compliance measure is to be capitalised on, and if they are not pursued as priorities, the compliance burden imposed will exceed the benefit obtained. Consequently, it is not clear to us why these other things could not be done without the additional compliance burden for similar benefit.

4.10 We would note that the legal interpretation tax gap is about tax that is not necessarily legally due. It is defined as where the taxpayer's and HMRC's interpretations of the law and how it applies to the facts in a particular case result in different tax outcomes. We discussed with you the methodology behind the calculation of the legal interpretation head of the tax gap. We understand that arriving at this figure is a complicated process involving 'top down' inputs around overall consumption and other statistical measures based on HMRC

historic case data. Anticipating future changes to the overall legal interpretation tax gap involves assumptions and judgements around behaviour, based on historic data about HMRC's dispute settlements, reflecting that however a dispute is resolved, the tax being disputed will fall out of the legal interpretation tax gap going forward, as the point of uncertainty has become settled. Thus, arriving at an estimation of the legal interpretation tax gap is difficult, and anticipating changes to it, and consequently, any expected revenue that may be raised is harder still.

4.11 We understand that it is accepted by HMRC that the legal interpretation part of the tax gap is not expected to be impacted immediately by the mere introduction of this measure, and that further action will have to be taken by HMRC. For example, if HMRC are made aware of the areas of uncertainty through the notification, they may dispute the tax position. In addition, we understand that the intention is that, as a result of the information received around areas of uncertainty, the government may seek to amend or clarify the law to ensure outcomes aligned with HMRC's interpretation of the law. However, as we said in our response to the previous consultation on this measure, it is not clear why these actions could not be taken as result of information obtained through judicious enquiries being raised into the relevant returns and as a result of discussions which are already happening with CCMs and through the BRR+ process. Even in circumstances where HMRC are involved in a lengthy dispute which has highlighted an area of uncertainty, in practice we suggest that HMRC should be able to identify from the business they are looking at what hallmarks would identify other taxpayers facing a similar issue, and raise the appropriate enquiries.

4.12 Thus it is not clear to us how this measure will itself additionally impact on legal interpretation tax gap, given that HMRC already have extensive powers to open an enquiry into, and investigate, a tax return, from which any disputes in respect of legal interpretation can be addressed.

4.13 The expected revenue that will be raised from this measure is very low compared to the overall legal interpretation tax gap, and this is discussed in more detail in response to question 21 below. However, we also understand from our discussions with HMT and HMRC that the potential tax raised for the Exchequer from this measure, and the consequential numerical impact on the legal interpretation tax gap, is only one of the policy aims.

4.14 We recognise that this measure is also intended to encourage businesses that do not currently act in a compliant and co-operative basis with HMRC to provide HMRC with additional information and easier identification of uncertainties, and sooner than would otherwise be the case. However, we are not convinced that this measure will change the fundamental behaviour of those that do not wish to act in this way.

4.15 **Question 2: If you do not agree with the government's proposed course of action, what alternatives do you suggest to address the problem?**

4.16 With regard to reducing the legal interpretation tax gap, we believe that a number of things could be done to make the position clearer in respect of legislative matters and thus reduce the number of differences around legal interpretation that arise. These measures would include drafting clearer legislation, signposting HMRC's position more clearly in its manuals (including when this position has changed) and redacting the manuals less often, as well as generally updating, rewriting and improving the guidance and notices.

4.17 In relation to tax disputes, we note from HMRC's call for evidence on the *Tax Administration Framework* that existing tax return enquiry processes are not especially effective at encouraging early resolution of tax disputes and we welcome the focus in this project on what can be done to accelerate resolution or prevent disputes arising in the first place. Any steps in this direction will also help to reduce tax uncertainties.

4.18 In addition, we believe that areas of uncertainty could be addressed more effectively than by this notification measure through more active and reciprocal discussion between businesses and their CCM. The focus of this measure is on businesses providing information and being more open and helpful with HMRC, whilst the issue

with collaborative compliance for large businesses in practice is that HMRC are effectively unable to reciprocate effectively to the full extent of businesses' existing 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. Some CCM's might be prepared to confirm to a taxpayer that 'you have got the position right', but others may feel they have to stick to the letter of the HMRC guidance process. Addressing this lack of reciprocation in the current system could ensure that more uncertainties are resolved in a more timely manner.

4.19 More generally, it is often reported to us that HMRC do not engage with requests for a view of a particular tax treatment from taxpayers. If a taxpayer considers there is sufficient uncertainty and they or their adviser write to HMRC, if HMRC were obligated to respond with setting out HMRC's view clearly, this would reduce uncertainty for compliant taxpayers and encourage taxpayers to seek clarification. Where perceived uncertainties among taxpayers were resolved in favour of HMRC's positions, then businesses would likely either have accepted the implied tax cost or organised their affairs in a different way. Where the uncertainty was resolved differently, HMRC would have an earlier opportunity to decide whether to accept the implications of that, or to take other action such as proposing legislative change to Ministers.

4.20 We note that, as announced in the March Budget, the government has begun its *Review of tax administration for large businesses* to better understand large businesses' experiences of UK tax administration. The aims of this review include looking at the degree to which the current administration framework provides businesses with early certainty where appropriate, ensures the efficient resolution of disputes in accordance with the law, and promotes a collaborative and constructive approach to compliance with the law. These are similar considerations to the policy aims of this measure. We suggest that this initiative could produce outcomes that would assist with reducing the legal interpretation tax gap. This review could also provide a vehicle whereby the government and HMRC could deliver more certainty by developing its capacity, for example, to provide clearances. As a general point the UK is behind the international field with regard to tax rulings or clearances (accepting that businesses in some jurisdictions have to pay for these).

4.21 Further in this regard, the consultations on this measure have not provided any information as to what will happen after uncertain tax treatments have been notified to HMRC. We would welcome some clarity around what is intended will happen next. The second consultation document cites some benefits that might be expected to arise (based on the experience of the Australian Tax Office (at paragraph 2.13)):

(i) tailor engagements and identify and resolve high-risk arrangements,
(ii) improve understanding of individual taxpayers' risk profiles and governance which feeds back to assurance,
(iii) identify where they need to provide clarity to taxpayers on transactions (in Australia this might be through published guidance or rulings), and
(iv) better understand tax risks across their tax paying population.

We would welcome some understanding of the mechanisms whereby HMRC expect a requirement to notify regime will lead to these outcomes in the UK. This question serves to highlight the proportionality that should be inherent in compliance measures such as this: that the additional compliance burden on taxpayers should be balanced by an improvement in the overall administration of the tax system by HMRC, in this case by providing additional certainty for businesses. We would be more supportive of this measure if we could clearly see how it would improve the experience of large businesses of the UK tax administration or increase certainty.

4.22 **Question 3: Is there an objective alternative to using BRR+ ratings that could exempt low-risk businesses?**

4.23 We appreciate the difficulties that would be involved with using BRR+ as a way to filter businesses in scope (because it is non-statutory and not appealable). While it may be possible to improve BRR+ to address these concerns, the overriding point is that a risk-based approach to the application of this measure would be beneficial to taxpayers and HMRC by ensuring focus of the regime on the few non-compliant large businesses that are resistant to an open and transparent relationship with HMRC.

4.24 One way of achieving this would be to introduce a regime that only applies to businesses to which HMRC have given notice to that effect. HMRC are presumably aware of the businesses that they would wish to target as a result of their lack of engagement with the BRR+ process. There is a precedent for this in the application of the transfer pricing rules to medium sized companies.

4.25 In any event, in order to achieve a policy aim of encouraging non-compliant businesses to disclose tax treatments that they are not currently making apparent to HMRC, either through the BRR+ or in their returns, as suggested in our previous response, why can HMRC not simply open enquiries into those businesses' returns in due course, or subject them to real time tax audits? We appreciate that that has a resource cost, but so do the steps necessary to capitalise on (and mitigate the adverse effects of) this measure. It is not clear to us why a new requirement to notify that applies to all large businesses is necessary.

4.26 **Question 4: Should there be other specific exemptions from the notification requirement?**

4.27 The second consultation document confirms that nothing disclosable under a different legislative requirement will need to be notified to HMRC under this requirement. We would welcome clarification that this will be the case whether or not the other legislative requirement requires disclosure of the same level of detail as will be required for a notification under this measure. In addition, does the reference to other legislative regime include usual self-assessment and disclosure on white space of the returns? We would assume not, but this should be clarified.

4.28 Similarly, the second consultation document states that banks subject to the Banking Code of Conduct (BCC) will not be excluded from this regime, but will not be required to notify positions that have been notified to HMRC under the BCC. We assume that HMRC are satisfied that discussion of the uncertain tax treatment under the BCC will provide a comparable level of detail so as to fully negate the requirement for a notification under this measure.

4.29 We note and welcome the proposed exclusion of collective investment schemes from these measures. It would be useful to have some further information about the proposed definition of collective investment scheme for these purposes, so we can understand which types of funds HMRC think should excluded (for example, will this exclusion extend to pension schemes?

4.30 We welcome that the government recognises the particular difficulties presented by transfer pricing cases in respect of this proposed measure, due to there often being a range of apparently 'correct' treatments, all transfer pricing positions could be considered to be 'uncertain'. Thus requiring notification of them would produce a large amount of notifications (in the largest businesses, there are literally millions of transactions to which this measure could potentially apply). Although the increase in the threshold to £5m will alleviate this issue to some extent, in the context of the largest businesses £5m remains a very small number. We suggest that transfer pricing should be excluded from the scope of the requirement to notify (or at least be given a qualified exemption, perhaps referring to widely used methods of transfer pricing and based on the model of the old 'general consents' under the historic Treasury consent regime, or be excluded from some of the triggers – see further at paragraph 6.41 below).

4.31 The most important exception from the requirement to notify, in terms of its general application, is the exception in respect of uncertainties that HMRC are already aware of (paragraph 2.26 of the second consultation document). This is the key exception to meet the policy aim of '*ensuring that businesses that are*

open and compliant in their relationship with HMRC should not have significant additional compliance costs' (paragraph 2.7 of the second consultation document). Ensuring that this exception operates satisfactorily in practice will require significant HMRC resource and detailed consideration of many practical factors. There are two key issues:

- the practical issues around this exception for businesses that have a CCM; and
- how the exception will operate fairly for large businesses that are within the scope of this measure but which do not have a CCM.

We discuss these in paragraph 5 below.

5 Exclusion where HMRC are already aware of the uncertainty

5.1 As noted above, the exception from the requirement to notify in respect of uncertainties that HMRC are already aware of is very important to reduce the compliance burden on businesses that are open and compliant in their relationship with HMRC. This scope of this exception will have to be set out very clearly in legislation in order for large businesses to rely on it and achieve the policy aim of reducing the compliance burden. A number of questions arise in relation to its potential application in practice that must be resolved and clarified.

5.2 During our discussions, HMRC provided some useful clarification around how they envisage this exception would work in practice, in particular confirming that the form in which the information about the uncertain tax treatment is provided to HMRC should not be determinative, providing the required details have been provided. Thus we understood that it will not be necessary for all the relevant detail to be provided at once or in one communication (as would be the case with a notification). We also understood that HMRC accept that they will be responsible for capturing the information that taxpayers provide to them, and will be required to consider ongoing discussions with the business in their totality. HMRC said they will expect CCMs to do a note of a call (or meeting) in which an uncertain matter is discussed and email it to the taxpayer as a record. This is welcomed but is a departure from the experience of some of our members in their current dealings with their CCM, in which discussions and agreements with the CCM are not documented. While this lack of documentation does not usually cause a problem within the current administration framework, a 'sign off' by the CCM of the information provided will under the new arrangements be crucial to provide businesses with the comfort that this exception applies. In addition, it will remain incumbent on taxpayers to check these notes to ensure they fully and correctly reflect the discussion and/or the information that they consider has been conveyed. Thus we envisage that in practice there will necessarily be some additional work for HMRC and taxpayers in 'agreeing' what has been provided to HMRC in respect of an uncertain tax treatment.

5.3 Although if there is the 'sign off' by HMRC as anticipated above, it is not expected to be the case, it remains unclear what the position would be if a business tells HMRC about an uncertain tax treatment during an accounting period and HMRC do not acknowledge the information received. How can a business demonstrate that HMRC are sufficiently aware of the uncertainty to avoid a penalty for failing to notify further down the line? Without some form of confirmation from HMRC that they have the requisite information about an uncertain tax treatment, it is likely that taxpayers may choose to notify the uncertain tax treatment in any event, thus suffering the compliance burden, and imposing an additional administrative burden on HMRC in terms of dealing with the notifications.

5.4 The second consultation document says that HMRC will expect the 'same level of detail' as required for a notification. This may not be possible 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 as a result of the timing of the discussions be dealt with?

5.5 We would also repeat here the concerns raised in paragraphs 4.6 to 4.7 above, that there will inevitably be duplication of effort, notwithstanding this exception and that for a variety of reasons, it may not be possible or practicable for a business to raise all uncertain tax treatments with their CCM to avail themselves of this exception. As a result we anticipate that the measure will impose a significant additional compliance burden on all businesses regardless of the policy intention of this exception.

5.6 The second issue around this exception arises because the population of large businesses within scope of the measure will include some businesses without CCMs. This introduces a significant disparity between businesses. This is recognised in the second consultation document (paragraph 2.28) and it is confirmed that HMRC will provide a method for these discussions to occur, to afford these businesses the same opportunity to avail themselves of this exception, although no details of this alternative channel have been provided. This will be critical to ensure fairness.

5.7 Ensuring fairness as between taxpayers is of utmost importance. This is an issue which is arising in relation to a number of different proposed compliance obligations; for example a similar issue arises in relation to the proposals around changes to *Transfer pricing documentation* that are also being consulted on[1]. One solution would be to set the cut off for these additional compliance burdens at the same level as that at which businesses become entitled to a CCM.

5.8 Alternatively, we suggest that the government should consider expanding the CCM regime so that all businesses which are generally considered to be 'large' for the purpose of additional compliance burdens are treated comparably. We recognise that this would present a resource issue for HMRC, but it is difficult to see how it will be possible to replicate this exception without replicating the CCM system and, therefore, effectively extending it. The benefit of extending the CCM regime would also be to build on the 'efficient risk-based approach' (as per paragraph 2.5 of the second consultation document) to compliance with a broader population of taxpayers.

5.9 As mentioned above (in paragraph 4.20), the government is currently conducting a *Review of tax administration for large businesses* with a view to considering what improvements can be made as HMRC continues to progress its 10-year *Tax Administration Strategy* and wider *Tax Administration Framework Review*. We suggest that the disparity between large businesses in relation to compliance burdens such as this are considered as part of that review.

6 Defining an Uncertain Tax Treatment

6.1 We welcome the work that has been done to ensure that the triggers present a better and more objective approach to defining what is an uncertain tax treatment than what was proposed in the first consultation document. However, some of the triggers remain very unclear and subjective in their scope and application, and there is a degree of overlap between the triggers. We address **Question 5: Do you think that the triggers are sufficiently objective?** and **Question 6: Can you suggest ways to make them more objective and certain?** in our comments on each of the triggers below.

6.2 ***Trigger (a): Results from an interpretation that is different from HMRC's known position***

6.3 Although the basic concept behind trigger (a) appears reasonable, the detailed framing of it in the second consultation document is currently too wide. We think this trigger should only require notification where

[1] Transfer pricing documentation - GOV.UK (www.gov.uk)

HMRC's position is unequivocal and the taxpayer takes a position that is more favourable to itself than this. There should not be an additional administration burden on businesses because HMRC are not sufficiently clear about their position on a particular area of law.

6.4 The description of the trigger in paragraphs 3.9 to 3.10 of the second consultation document, and also paragraph 3.30 which describes what should constitute HMRC's 'known position', give rise to a number of practical questions that require further thought as to how this concept will be translated into legislation as an objective test that businesses can comply with. It is often very difficult to ascertain HMRC's view in respect of any particular matter of difficulty. This is for a variety of reasons, including the following.

- Much of HMRC's guidance has not been revised for many years or even for decades, and some of it reflects legislation or interpretations that have since been superseded.
- This is demonstrated from time to time when in disputes HMRC argue a position that is contrary to their guidance (for example see the recent Upper Tribunal decision in the case involving Mark Shaw[2]). Presumably in that situation (if it occurs once the requirement to notify an uncertain tax treatment is in force) the business would not get penalised for not making a notification on the basis they did file in accordance with HMRC's guidance. However, it does make it difficult for businesses to identify HMRC's known position.
- HMRC's guidance is often a helpful tool but often does not provide an answer. It also often simplifies complex points and, as a result, is lacking in clarity (the domestic reverse charge guidance is a good example) and can sometimes be found to be incorrect. Revised guidance is also often problematic. Revenue & Customs Brief (RCB) 12/2020 is a relevant example of revised guidance that did not consider the treatment of dilapidation payments (which are still under review). Also, the RCB initially stated that the changes would apply retrospectively (albeit, HMRC changed their position following consultation with various stakeholders).
- Will there be careful and full publication of changes to HMRC guidance? Even so, how reasonable is it to expect taxpayers to monitor guidance? It is possible for HMRC to indicate their change of view by deleting a single sentence in their existing guidance. It is unreasonable to expect taxpayers to keep the whole corpus of guidance under constant review and discern from the deletion or removal of particular words some change of position by HMRC. Some parameters around this issue would need to be set.
- How will this measure impact on the more fundamental question of taxpayers' ability to rely on guidance? It is often stated that no reliance should be placed on HMRC guidance – there is some tension between this and holding it out as a 'known position'.
- What conclusion should businesses reach when the business asks for a ruling, but HMRC say there is no uncertainty around the subject matter of the ruling request as it is dealt with in the guidance, and so will not give a ruling (this often arises in the context of VAT)? Would a notification be required in these circumstances where HMRC say the position is clear in the guidance? But from the business's perspective there is uncertainty, which is why the ruling was requested. We suggest that this tension needs to be addressed.
- What is meant by 'in the public domain'? Circumstances can arise where HMRC's views are known by only some of the taxpayer/adviser population – for example as a result of stakeholder engagement through consultative committees such as the R&D Consultative Committee. Therefore, it is important

[2] Mark Shaw v HMRC [2021] UKUT 0100 (TCC)

that the trigger will only apply in respect of views which are clearly published in HMRC's manuals or a similar publication.

- Will the reference to court decisions include decisions of the First-Tier Tribunal, since its decisions are not precedent? Presumably, it will not include HMRC positions revealed in litigation that have been rejected by the Courts? HMRC's position in relation to ongoing litigation is often not clear to taxpayers - in particular, when HMRC have decided not to appeal a decision of the First or Upper Tier Tribunals.
- Paragraph 3.10 of the second consultation document refers to 'higher risk criteria' – what does this mean and how can you have a 'known position' on something which is merely a risk and so, by definition, might resolve in more than one way? Or is this intended to create a published list of uncertain tax treatments which must be reported, similar to the Category C reportable tax positions in Australia? If so, there must be clarity around this. We do not think it is sufficient to refer to 'criteria or information' – such 'higher risk criteria' must be clearly published as things requiring notification and labelled as such.

6.5 We welcome that in our discussion with HMT and HMRC around these points of difficulty, HMRC agreed that notification should only be required where HMRC's position is set out clearly and explicitly and the taxpayer is filing against it. We also welcome the confirmation from HMRC that this trigger would not apply where there was no known HMRC position.

6.6 It would be welcome if an outcome from the introduction of this measure, and this trigger in particular, is an increased commitment on HMRC to promptly update its guidance and to provide responses to clearance and ruling requests that address and provide HMRC's view on the issues raised (notwithstanding the overriding principle that ultimately tax should be paid by reference to the law and, as was confirmed at paragraph 2.7 of the first consultation document, HMRC's interpretation of the law is not always correct).

6.7 ***Trigger (b): Was arrived at other than in accordance with known and established industry practice.***

6.8 We accept that there are probably some 'established industry-wide approach[es] to treating certain transactions'. However, HMRC probably overestimate the extent to which businesses know what their competitors are doing. While HMRC see the returns from all of the businesses within a sector, the taxpayers do not. Thus, we are doubtful about how often this trigger will be in point.

6.9 If it is introduced as part of this measure, it should apply only in respect of unequivocal published or publicly available industry practice to ensure a clear and objective test, although where and by who the practice is published would require further thought.

6.10 It would also be necessary to define at what level 'industry' should be considered. How would it apply to diverse sectors such as property and construction? If, for example, a industry practice is published by a representative body, how would the trigger apply to businesses that did not identify with the representative body in question. This could cause a similar 'insider' problem to the stakeholder engagement group referred to above in relation to trigger (a).

6.11 Another problem with this trigger is that industry practices change over time and it is not always possible to know what to compare the business' position to. If this trigger were introduced, we suggest that adherence to any form of industry practice should be sufficient for it not to apply.

6.12 ***Trigger (c): Is treated in a different way from the way in which an equivalent transaction was treated in a previous return and the difference is not the result of a change in legislation, case law or a change in approach to accord with HMRC's known position.***

6.13 The concept behind trigger (c) is reasonable, but we have a number of questions and points that should be addressed to ensure it is sufficiently objective, not least that all of the uncertainties around establishing what is HMRC's known position arise in relation to this trigger as they do in relation to trigger (a).

6.14 The concept of 'equivalence' is difficult but it will be important to define this in order for taxpayers to be able to properly consider the application of this trigger. What is the position if there have been some changes and there is doubt as to whether the position has changed? Would sufficient change or lack of equivalence result in trigger (d) applying? We accept that the triggers are not intended to be mutually exclusive, but a very large grey area or overlap between them suggests that one or the other is not required, or that they could be merged. At the very least it should be clear which trigger question takes priority in any given circumstance.

6.15 This trigger could evidently capture cases not only where HMRC might disagree with the new treatment, but also where the business might have seen an issue with the previous treatment, and the business has now decided to take a more cautious approach. As such, what would the position be if, as indicated may be possible in the example in paragraphs 3.17 to 3.18 of the second consultation document, the original treatment is the correct one? Presumably existing rules around time limits for enquiries into past returns and discovery assessments would continue to apply notwithstanding the notification? Is the assumption that the notification will only be required if the change in treatment results in a tax loss to the Exchequer above the threshold, thus the trigger is not so much about ensuring the correct treatment, but picking up a change of treatment that results in less tax being paid?

6.16 ***Trigger (d): Is in some way novel such that it cannot reasonably be regarded as certain.***

6.17 This is the most problematic of the suggested triggers and, in our view, should be removed entirely. This trigger does not provide an objective test as to what an uncertain tax treatment is and would on the face of it trigger a requirement to notify every time a business does something new that has not been seen in the market place before.

6.18 It is not at all clear to what or whom the criteria of 'new' or 'novel' is intended to apply. We understand from our discussions with HMT and HMRC that this is not intended to be so wide as simply to be novel to the taxpayer; as this trigger would then just cover everything on which HMRC have no identifiable published practice where the taxpayer has to take a view on the correct treatment for the first time. As noted in paragraph 6.5 above in relation to trigger (a), the corollary of HMRC's known position being that there is no known HMRC position is not intended to cause a requirement to notify a tax treatment. Nor is something being merely novel to the UK, for example, the product is common outside the UK but is being newly introduced to the UK.

6.19 We understand that HMRC are driving at circumstances where taxpayers are faced with a new or novel product, transaction or business structure where the taxpayer is 'struggling' as to the correct tax treatment, and the circumstances are such that they may wish to get advice. But how is this to be distinguished in practice from a situation where there is a new or novel circumstance where there are various ways that it can be treated, but the taxpayer is not struggling, that is to say they believe that they know the correct treatment? In such circumstances there is no uncertainty on the part of the taxpayer. In the event that advice is considered necessary, would that not mean that the relevant trigger is trigger (g)?

6.20 'Novel' products can arise by bundling of products at the behest of a customer, or of sales people, typically for commercial reasons (for example to hit targets in the relevant business). Would these be within this trigger? It would not be unusual for a tax team to find out about this after the event.

6.21 The 'branch in VAT group' example in the consultation is particularly unhelpful as it is an illustration of a type of structure that few taxpayers would implement these days; this example presents an extreme position that does not really help to understand this trigger and when HMRC would regard it as being in point. (This point

is also relevant for trigger (a) above - the examples given in guidance are often so clear cut / egregious that they do not aid understanding of the policy positions or how to approach fact patterns that may sit on a borderline.) The example involves the re-routing of services within a corporate group, in a way that most would regard as avoidance. But the new group structure seems to be one that could have been entered into at any time since VAT was introduced: it is unclear what might make it 'new or novel', other than perhaps to the individual taxpayer, nor, therefore, why HMRC thought it a useful example.

6.22 The example also raises the question of the difference between 'novel' and 'new': the branch is newly formed, but, per se, having a branch is not a novelty.

6.23 Further with regard to this example, a VAT branch application would normally have to provide the explanation/reason for the change. If HMRC do not believe they have sufficient information then the branch application itself provides HMRC with the opportunity to engage, so this situation does not need a whole new process to alert HMRC to the tax treatment arising from the branch.

6.24 There are likely to be similar circumstances where novel products, transactions or business structures are already required to be brought to the attention of HMRC and it would seem an unnecessary duplication of effort for a notification to also be required. For example, HMRC are often very slow to respond to VAT group applications and also to applications to change a partial exemption method. A taxpayer would normally proceed on the basis that its application will be acceptable, because it would have carried out the sufficient analysis prior to deciding to make the application. We assume that it is not the intention that this trigger (d) should cause a requirement to notify these new circumstances of a business while the group application or partial exemption method remain uncertain due to waiting for a response from HMRC. Perhaps the solution in these circumstances is to ensure that the exception around what HMRC already knows or, possibly, the exception around things that are disclosable under different legislative requirements are broad enough to capture this sort of circumstance. Nonetheless, these considerations highlight the complexities that will arise if the triggers are not sufficient well defined and focussed.

6.25 This example does, however, highlight the difference between factual and legal uncertainty. For example, the question of whether the purported branch has adequate substance in the UK to be respected for VAT purposes, is a factual uncertainty, but the consequences of it having (or not having) that substance may not be in doubt. As a matter of general principle, as this measure is concerned with the 'legal interpretation' gap, only matters of legal uncertainty should be caught by the triggers.

6.26 ***Trigger (e): In respect of which a provision has been recognised in the accounts of the company or partnership, in accordance with Generally Accepted Accounting Practice (GAAP), to reflect the probability that a different tax treatment will be applied to the transaction***

6.27 In practice there is probably considerable overlap between this trigger and trigger (a), because a provision in the accounts is most likely to be made in circumstances where a tax position is taken that is contrary to the known position of a tax authority. However, it is objective on its own terms and is likely to be the easiest of the triggers for businesses to track for the purposes of notifying uncertain tax treatments. Therefore, we do not have any further comments on it.

6.28 ***Trigger (f): Results in either:***

- ***A deduction for tax purposes greater than the amount incurred by the business, or***
- ***Income received for which an equivalent amount is not reflected for tax purposes,***

unless HMRC is known to accept this treatment.

6.29 Although this trigger is broadly objective, it seems to be an unnecessary catch-all that could be merged with trigger (a), noting that all of the uncertainties around establishing what is HMRC's known position arise in relation to this trigger as they do in relation to trigger (a). Also, this trigger does not seem to be aimed at identifying positions of tax uncertainty; it seems to be more focussed on avoidance which is out of keeping with the main focus of this measure.

6.30 The trigger seems to have been designed with only corporation tax (and possibly income tax) in mind and it is not at all clear how it would be relevant in the context of VAT.

6.31 Clarity around what 'reflected' is intended to mean here would be welcome, or whether the direct tax distinction between income and capital was to be read into it, but overall, we cannot see why this trigger is considered to be appropriate or necessary and it would be better removed and reliance placed on trigger (a).

6.32 ***Trigger (g): Has been the subject of professional advice, that is not protected by legal professional privilege:***

- ***which is contradictory, in terms of tax treatment, to other professional advice they have received, or***
- ***which they have not followed for the purpose of determining the correct tax treatment of a given transaction.***

6.33 Whilst trigger (g) is broadly objective, it could create some odd behaviours - for example only obtaining one professional view, or spending time to convince the adviser with the different opinion to change their view to align with the other view. While understanding the need to exclude professional advice protected by legal professional privilege, we have some concerns that this trigger will increase the distortions in the market that can result from legal professional privilege, incentivising taxpayers specifically towards getting counsel/legal opinions in every case – whereas in many situations Chartered Tax Advisers, regardless of legal or other qualifications, have the necessary expertise to give the advice.

6.34 We suggest that some clarity needs to be introduced around timing and the tax consequences of the advice. For example, if one firm had advised, perhaps some years ago, that VAT was not due, and six had since advised that it was, should a distinction be drawn around whether the taxpayer followed the one, or the six? As the trigger currently reads, the six would still be 'contradictory … to other professional advice', and the one would be advice that they had 'not followed'. Thus a notification would be required in any event. Similarly, in circumstances where an adviser has said that said a tax position would likely be correct, but the taxpayer has decided to take a more risk averse approach, it would seem that the taxpayer would still be required to notify. We do not imagine that this is intended.

6.35 We suggest that the trigger should not apply if the adopted tax treatment aligns with HMRC's published view, even if different professional views have been received on the point. It should also be limited to circumstances where the taxpayer has adopted a more favourable tax position.

6.36 **Question 7: Do you think any of the triggers will not capture the uncertain treatments they are intended to identify? Question 8: Are there additional triggers that would identify uncertain tax treatments that would not be identified by these triggers?**

6.37 Whilst appreciating the difficulty faced by HMRC in seeking to devise objective tests to scope out 'unknown unknowns', given that the triggers are the definition of what uncertain tax treatments are, they can only capture what they are 'intended to identify' – that is to say the type of tax treatment that HMRC consider poses sufficient uncertainty in the area of legal interpretation to warrant requiring taxpayers to notify them of it. Similarly, it is surely not possible for there to be 'additional' uncertain tax treatments that are not identified by these triggers – because these triggers will determine what uncertain tax treatments are. In considering the analogy of 'unknown unknowns', whilst it may be reasonable to say that the taxpayers do

'know' about the second of these 'unknowns' (because they are their tax positions), it is not reasonable to expect them to guess or decipher the first of the 'unknowns' – that is to say guess what exactly it is that HMRC wish to be told about.

6.38 The tax system inevitably involves some uncertainty because Parliament cannot legislate for every eventuality. Even if the legislation is clear (and much is not) it cannot anticipate every circumstance and how legislation applies in those circumstances. Perversely, the more words there are in legislation, often the more there is to argue about. This is why we are doubtful that this measure will be successful in reducing the amount of uncertainties in the tax system. It may provide HMRC with some additional information about areas of tax law where HMRC are aware that uncertainties exist (hence the triggers), or information around those uncertainties at a different time or in a different format to what it would have otherwise received under the existing tax administration system. But in every case further work will be required to remove or reduce the area of uncertainty from tax law (to the extent that this is possible) – and that is work that in our view could be undertaken in any event without this additional compliance burden.

6.39 From the perspective of ensuring that this compliance measure is as fair and practicable as possible, as we say above, notification should only be required on the basis of clear objective tests (or triggers). These should be along the lines of requiring taxpayers to 'tell HMRC when you are taking a position that you know they won't agree with' or even 'tell HMRC when you know you are taking a position that they might not agree with'. It is not reasonable to go beyond this and expect taxpayers to expend resources seeking to identify uncertainties in law or report information to HMRC to help HMRC identify uncertainties in the law.

6.40 **Question 9: Which of these triggers do you consider should apply in respect of transfer pricing uncertainties (refer paragraph 2.31), and why?**

6.41 We discuss above (at paragraph 4.30) the particular difficulties presented by transfer pricing cases in respect of this measure, because due to there always being a range of 'correct' treatments, all transfer pricing positions could be considered to be 'uncertain'. Even with an increased threshold of £5m notification of transfer pricing uncertainties would be required for millions of transactions, because in the context of the largest businesses £5m remains a very small number. Our preferred approach would be for transfer pricing to be excluded from the scope of the requirement to notify as entirely as is possible to achieve. This is an area that is already the focus of considerable compliance work by HMRC and, one that has its own specific compliance measures, for example the Profit Diversion Compliance Facility. As noted above, it is also currently the subject of a consultation on Transfer Pricing Documentation. However, more specifically, transfer pricing should in any event be excluded from triggers (d) and (f), in order to reduce the administrative burden on businesses and ensure that unnecessary notifications are not required.

7 Threshold for reporting

7.1 **Question 10: Do you agree with the threshold of £5m for both direct and indirect taxes?**

7.2 We welcome the increased threshold to £5m. We recognise that, although £5m may not be a significant amount to many of the largest, global multinational businesses, it is a significant figure in its own right from the perspective of the Exchequer.

7.3 We also note, however, that the level of the threshold will apply differently with regard to corporation tax (and income tax) as compared to VAT. Because VAT is a tax on turnover, and corporation tax a tax on profits, a threshold of £5m in tax will come from a much higher level of turnover for corporation tax than for VAT.

7.4 We understand that the £5m threshold is for each tax. Is it intended to apply per entity or per group? In this regard we would note that a corporation tax group can be different from the VAT group. We think that the

issue raised in paragraph 7.7 below (around what issues businesses discuss with their CCMs) should also be considered here in relation to the level of the threshold, if it is not possible to address it by means of a concept of 'materiality'.

7.5 **Question 11: Considering the concerns outlined about a materiality threshold, do you have further points to support one?**

7.6 We note the points made in the Summary of Responses and the second consultation document, but consider that a materiality threshold would still be useful in terms of reducing the compliance burden of this measure and welcome that the government is still exploring this as a possibility. As we said in our previous response an approach similar to that adopted by the Australian Tax Office would provide a fairer result, accommodating the different sectors operating within the large business community. It also ties in with the way that external auditors would approach the decision as to whether or not a provision would need to be made in the financial statements. In particular, the practical effect of amalgamating a large volume of smaller value positions (paragraph 3.39 of the second consultation document) could be unduly burdensome, requiring reporting of individual issues down to low levels of materiality, while providing little meaningful information to HMRC on uncertain tax treatments.

7.7 The concept of materiality will also be a factor in how well the exception from the requirement to notify in respect of uncertainties that HMRC are already aware of works to reduce the compliance burden. As we say in paragraphs 4.7 and 5.5 above, a business is unlikely to have the resource to speak to its CCM about issues that are not material to the business, which will depend on the size of the issue and the size of the business.

7.8 **Question 12: Do you agree with the proposed rules to calculate the threshold? Question 13: If you do not agree with the proposed rules to calculate the threshold, can you suggest an alternative calculation?**

7.9 We suggest that how the threshold will operate requires further thought in relation to VAT. It is not clear on whether the threshold applies on a gross or net basis. A businesses liability to VAT is a result of both input tax and output tax implications. A tax position taken by a taxpayer in relation to VAT liability can have (and in the financial services sector generally will have) implications for both output VAT and input VAT. Is the intention that the threshold will apply to the net VAT position? Also, how would it work with regard to VAT partial exemption and reverse charge? Is the threshold to be considered before or after these rules are applied by a business to arrive at its VAT liability?

7.10 It is not clear to see how quantum of uncertain tax treatments will be ascertained and ascribed to a particular period of time in respect of all taxes. The position will also be complicated if the interaction between the taxes is considered. For example, in relation to PAYE, is the quantum the PAYE change, or the PAYE change net of the corporation tax impact?

8 Method of notification

8.1 **Question 14: Do you think requiring notification for each tax within scope will be easier to comply with than a single notification?**

8.2 We welcome that separate notifications will be required for corporation tax, income tax and VAT. This is an obvious and positive change.

8.3 **Question 15: Do you agree with the notification being required when the return is due?**

8.4 With regard to timing of the notification, submission of this in line with 'relevant' returns, and timed to coincide with the due dates for annual returns or the last periodic return for the tax year where returns are not annual has benefits in terms of using existing processes, but will present challenges.

8.5 With regard to corporation tax, we reiterate the points made in our previous response. Many groups will submit corporation tax returns over a, say, a two month period with the parent company several weeks after most subsidiaries, with group relief and corporate interest restriction allocations and calculations being considered as a final step before submitting the parent company return. The second consultation document suggests only a group notification option in respect of VAT. A requirement to include notification of an uncertain tax position in each company's corporation tax return would mean HMRC potentially receiving several notifications of the same uncertain tax treatment, as an issue may well impact more than one member of a group. Consequently we suggest that the notification in respect of uncertain tax treatments with regard to corporation tax should also be made in respect of the group, by reference to the due date of the parent's corporation tax return.

8.6 Clarification will be required on the periods to which these measures are expected to apply – is this by reference to the date of the return or the date of transactions covered by a particular return? For example, assuming that the notification is required returns filed on or after 1 April 2022, will this cover transactions in VAT returns for the quarter ended 31 March 2022 (that is transactions occurring in the period from 1 January to 31 March 2022). Additionally, where a taxpayer is partially exempt, will this notification apply to transactions that feed into the annual adjustment calculation? For example, a taxpayer with a March 2022 VAT year end will include its annual adjustment for the year ended 31 March 2022 on its VAT return for the quarter ended 30 June 2022; consideration needs to be given as to whether this would mean that the transactions forming the basis of that annual adjustment calculation (that is to say from 1 April 2021 to 31 March 2022) fall within this regime.

8.7 **Question 16: Do you agree, for non-annual returns, with the notification being required when the last return for a financial year is due to be filed?**

8.8 Given that we agree that notifications should not be required in respect of each non-annual return, we agree that a sensible compromise would be for the notification to be required with the last non-annual return that is made in relation to a financial year.

8.9 **Question 17: Do you agree that tax neutral inter-entity transactions should be excluded?**

8.10 We agree that tax neutral inter-entity transactions should be excluded as there cannot be any tax loss to the Exchequer as a result of these transactions.

9 Level of detail

9.1 **Question 18: Do you agree that the information required in a notification should be covered in guidance?**

9.2 We do not agree that the information required in a notification should be covered in guidance. This should be set out in the legislation. Guidance can be used if necessary to provide examples, but the legislation should clearly set out the compliance burden.

9.3 We agree that the information requirements should be limited to the items set out at 1) to 5) of the list in paragraph 5.2 of the second consultation document.

9.4 It is important for the information requirements to be in legislation in order to link in with the exception from the requirement to notify if the relevant information has already been provided to HMRC (discussed at paragraph 5 above). If taxpayers are relying on this exception to negate their compliance obligation, and the consequence of getting this wrong is a penalty, it is not satisfactory for the obligation and the exception to be set out partly in legislation and partly in guidance (which could be changed).

9.5 We would welcome some clarity around the potential overlap with discovery assessments. We note at paragraph 3.94 of the Summary of Responses HMRC are suggesting that there would be limited circumstances where a discovery assessment could be raised following a disclosure under this new regime (in the absence of careless or deliberate behaviour). We suggest that this important point should go into guidance. However, paragraph 3.94 suggests it would only apply if the notification is submitted on time. Is this correct? Our understanding would be that the notification only needs to be made before the enquiry window closes (per FA 1998 Schedule 18 paragraph 44). We would also like to understand better what the 'limited circumstances' are when HMRC consider it could still issue a discovery assessment – this should also be set out in guidance. In addition, FA 1998 Schedule 18 paragraph 44(2) lists the information that is considered to be available to the HMRC officer for the purposes of determining whether a discovery assessment can be made. This list should be updated when this measure is introduced so that it is clear that anything submitted in relation to an uncertain tax treatment, whether informally (such that the exception in respect of what HMRC are already aware of applies) or formally (by way of a notification) counts as 'available'.

10 Penalties for failures to report

10.1 We welcome confirmation that there will still be a reasonable excuse provision in relation to the imposition of a penalty. However, given the size of the penalty in many cases it will not be cost effective for a firm to engage advisers to mount a reasonable excuse defence, so the result may be companies paying penalties despite considering they have a reasonable excuse (which would lead to feelings that the system is not fair etc).

10.2 Is a reasonable excuse believing that there is no uncertain tax treatment (as defined), even if HMRC then raise questions about the position, thus indicating that there may, in fact, be some uncertainty?

10.3 The one level of penalty does not encourage 'good behaviour', for example late notification if a taxpayer discovers it has omitted to notify an uncertain tax treatment. In addition to a reasonable excuse defence, there should be a lower penalty for unprompted late disclosure.

10.4 **Question 19: Do you agree failure to notify regarding a partnership return should be charged on the nominated partner? Question 20: If the penalty is not on the nominated partner, on whom should the penalty be charged?**

10.5 We suggest that the penalty for failure to notify regarding a partnership return should follow similar principles to those that apply in respect of failure to deliver a partnership income tax return. Consequently, the penalty for failure to notify should be charged on all relevant partners (anyone who was a partner in the partnership to which the relevant return relates at any time during the period covered by the partnership).

11 Assessment of Impacts

11.1 **Question 21: Do you have any comments on the assessment of equality, and other impacts?**

11.2 The notification requirement will give rise to a large compliance burden for large businesses, with a corresponding impact on administration for HMRC. This seems to us to be disproportionate to the amount of tax that is expected to be raised by the Exchequer.

11.3 The threshold is now £5m and the estimate of the Exchequer impact remains a maximum of £45m in 2023-24 (but with reduced revenue raised in other years in the Assessment of Impacts from that set out in the

consultation last year). This indicates that the expectation is that this measure will only raise revenue in a maximum of nine cases per year, but the number of businesses that will be within scope is in the thousands.

11.4 £45m is a barely significant proportion of the interpretation tax gap, which is estimated to be £4.9bn. Paragraph 2.1 of the second consultation document notes that '*HMRC estimates that the majority of the legal interpretation gap arises from disputes between HMRC and large businesses*'. In other words, the majority of the £4.9 billion legal interpretation tax gap - so at least £2.5 billion is considered to be caused by large businesses. £45m is less than 2% of this. We note that Fig 5 of the NAO's tax gap report[3] (page 21 of this pdf) showed that the legal interpretation tax gap reduced by £0.6 billion from 2015/16 – 2018/19 – so it has been reducing far more annually without this measure, and this obligation to notify uncertain tax treatment will not materially improve the position.

11.5 With thousands of businesses in scope of these requirements, if compliance cost averages £5k per business, there will be a significant economic cost over the financial years considered by the Assessment of Impacts. In some years, there will be an overall net economic loss.

11.6 The significant economic cost for business does not take into account the cost for HMRC in providing the necessary additional resource in order to be able to deliver the measure. The Assessment of Impacts notes that '*HMRC will require some additional resources …*'. No detail around these resources, nor the cost of providing them is given, however, based on the current proposals we think that these could be significant. Resources will be required in relation to the operation of the measure (for example providing the comparable exception for businesses that do not have a CCM), the monitoring of notifications that are received (as well as compiling the equivalent information that is otherwise provided to HMRC, as well as very importantly, taking action in light of the notifications received in order to actually improve the tax system and reduce uncertainties going forward.

11.7 We would welcome some more transparency on the costs and numbers of people at HMRC that will be involved in this measure. Will the monitoring of it fall under the Tax Avoidance group or to CCMs?

11.8 We accept that in its report the NAO notes that the tax gap is notoriously difficult to estimate and that is unclear what the precise relationship is between the cost of HMRC's work, the yield from that work and the tax gap. Notwithstanding this, we think there is a serious concern that this measure is not 'value for money' for HMRC: that is to say that the costs of HMRC dealing with the information it will get, will not generate anything like their usual yield from corporate enquiries (figure 14 on page 35 of the NAO's tax gap report shows HMRC get c£43 per £1 spent on enquiries).

11.9 It would also be useful to have a more detailed understanding of why is it envisaged that the amount of tax expected to be raised in the years presented will rise. In principle there might be many behavioural reactions to uncertainties being surfaced earlier. Where perceived uncertainties among taxpayers were resolved in favour of HMRC's positions, then businesses would likely either have accepted the implied tax cost or organised their affairs in a different way. Where the uncertainty was resolved differently, HMRC would have an earlier opportunity to decide whether to accept the implications of that, or to take other action such as proposing legislative change to Ministers. We appreciate the difficulties of reconciling aggregate estimates with specific behavioural routes, but the more understanding there is of the mechanisms that are expected to be in play, the better able we shall be to assess the open issues so as to come to the best policy choice.

[3] https://www.nao.org.uk/wp-content/uploads/2020/07/Tackling-the-tax-gap.pdf

12 Acknowledgement of submission

12.1 We would be grateful if you could acknowledge safe receipt of this submission, and ensure that the Chartered Institute of Taxation is included in the List of Respondents when any outcome of the consultation is published.

The Chartered Institute of Taxation

4 June 2021