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Finance Bill 2021-22: Notification of uncertain tax treatment by large businesses

Comments by the Chartered Institute of Taxation

1 Executive Summary

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

1.2 Following two consultations, in July 2021 the government published draft legislation for the new compliance obligation for large businesses to notify uncertain tax treatment to HMRC. This draft legislation will be included in Finance Bill 2021-22, with the obligation to notify applying in respect of returns that are required to be made after 1 April 2022. In August 2021 HMRC also published draft guidance for this measure. The CIOT has also commented on the draft guidance and our comments below on the draft legislation should be read in conjunction with our comments on the draft guidance. In this submission we have largely confined ourselves to mentioning the amendments that we suggest are made to the draft legislation. We have made more general comments on the measure, and identified the areas where there is currently a lack of clarity, in our comments on the draft guidance.

1.3 The draft legislation shows that the government has continued to listen to stakeholders through the second consultation and sought to address some of the key concerns raised. However, while the consultation process has fashioned this compliance obligation into something that is largely workable, we remain of the view that similar effects could have been achieved without legislation, within the existing tax administration framework. It is a shame that this measure was announced in 2020 having already been decided upon in principle, and that consultation only started at 'Stage 2'. Had there been a 'Stage 1' consultation about how to tackle the problems identified – the non-compliant minority of large businesses and the legal interpretation tax gap - we do not think that we would have ended up here. There are other things that could be done, many of which will be needed in any event if this compliance measure is to be capitalised on, without also adding to the burdens of compliant businesses.

1.4 It is our view that this measure fails to meet several of the CIOT's objectives for the tax system; including that the legislative process translates policy intentions into statute accurately and effectively, without unintended consequences, that the tax system provides simplicity and clarity, so people can understand how much tax they should be paying and why, and also that it provides certainty, so businesses can plan ahead with confidence.

1.5 There has been significant engagement with HMRC and HMT and a willingness to discuss the concerns we raised throughout the consultation process, which has been valuable. Nevertheless, because of the starting point, notwithstanding the improvements that have been made to the measure as a result of this process, we remain unconvinced that it will achieve the stated policy aims effectively or proportionately. We are not convinced that legislation is necessary to achieve the policy aims, and the measure now being introduced will not be easy to comply with and will result in a great deal of uncertainty for taxpayers.

1.6 This measure will result in a substantially increased compliance burden for all large businesses notwithstanding the general exemption, which is intended to ensure that open and transparent businesses that are already discussing what may now be considered uncertain tax treatments with their Customer Compliance Manager (CCM) will not have significant amounts of additional work. This is because all large businesses will have to put in place processes to capture uncertain tax treatments (which remain poorly defined) and ensure that these are either discussed with HMRC or a notification is given. We explained in our response to the second consultation[1] that there are many reasons why it is not always possible to discuss issues with CCMs and, therefore, notifications may be required from open and transparent businesses, as well as those that are currently less willing to engage with HMRC about their tax treatments.

1.7 We remain concerned about the parity of treatment between businesses that have a CCM and those that do not. This discrepancy has been recognised throughout the consultation process and the government's policy paper published in July 2021 alongside the draft legislation said that for taxpayers without a CCM HMRC will utilise their existing Customer Engagement Team to provide a structured opportunity to discuss tax uncertainties. HMRC has not yet provided any detail as to how this might work. This is discussed further in our comments on the draft guidance.

1.8 While we welcome the reduction in the number of 'triggers' in the definition of what is an uncertain tax treatment from seven to three, the triggers in the draft legislation are not without their difficulties. We discuss below the inherent uncertainty and lack of precision in the third trigger (or notification criterion) around what a tribunal or court might find to be incorrect. This, in particular, will mean that this is an uncomfortable piece of legislation to deal with for those large businesses that want to be compliant – especially those without CCMs.

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.

[1] Notification of uncertain tax treatment by large businesses - CIOT response – see paragraph 4.7

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 Paragraph 8 - Requirement to notify

3.1 Paragraph 8(3) sets out when the notification of an uncertain tax treatment must be given. The application of this rule is considered in the guidance under the section discussing the notification process. The examples in UTT15200 of the guidance demonstrate some practical difficulties that will arise because of the requirement to notify not being aligned with the rules relating to corporation tax returns. For example, we do not see how **Example Five – Change of company year-end (financial year is more than 12 months)** can be correct. It suggests that, where a business has an accounting period of more than 12 months, there are two deadlines for notification of uncertain tax treatment. This seems (a) to be impossible from a practical sense – the business may not have their accounts and corporation tax return ready in time to form a view for the first 12 months - and (b) incompatible with the deadline set by FA 1998 Schedule 18 paragraph 14 for the submission of the return. Paragraph 14(1)(b) says that where the company prepares accounts for a period exceeding 12 months but less than 18 months then there is only one filing deadline – which is set by reference to the end of the whole period, although two returns are needed (one for the first 12 months and one for the remaining period).

3.2 We suggest that HMRC should amend the legislation and guidance so that the deadline for the notification of the uncertain tax treatment matches that of the corporation tax return, that is to say matches FA 1998 Schedule 18 paragraph 14. The draft legislation currently does not cater for paragraphs 14(1)(c) or (d) either, or allow for later submissions. For example, FA 1998 Schedule 18 paragraph 19 says that a company is not penalised for late submission if Companies' House delays their accounts filing deadline to later than the corporation tax return deadline, and the company submits their corporation tax return within the revised Companies House deadline. Some corporates used this more than usual in the last 12 months or so due to the impact of the pandemic. We suggest that the deadline for notification of an uncertain tax treatment should be similarly moveable.

3.3 We also refer to the discussion in our comments on the draft guidance (see paragraphs [9.6 to 9.9]) around how the notification deadlines works in relation to VAT returns. Further, in relation to VAT, the legislation is silent on when the assessment of uncertainty is made. For corporation and income tax purposes this is unlikely to be of any practical significance but for VAT, as we discuss in our comments on the draft guidance, there could be a period of time between submission of the relevant VAT return and the deadline for notification. If a business is required to reassess whether a transaction is uncertain against HMRC guidance, or case law (which could have changed since the relevant VAT return was submitted) this could be a very significant exercise and hugely increase the administrative burden of the notification requirement. It would

be preferable if the law was clear that the assessment of uncertainty takes place at the time the relevant return is submitted.

3.4 We also suggest that the position is not clear in circumstances where a tax treatment becomes uncertain sometime after the relevant financial year and after the return for that period has been filed. Generally accepted accounting treatment, specifically IFRIC23, requires changes in circumstances to be taken into account. Thus, would notification be required if a provision in the accounts is required in respect of an historical accounting period, after the return for that period has been filed, because a treatment that was previously considered to be certain has become uncertain? Paragraph 8(1) of the draft legislation requires notification '*if a relevant return for <u>that year</u> includes an amount .. that is an uncertain amount*.'(emphasis added). How would this apply if the provision in the accounts were made in the accounts for a subsequent financial year?

4 Sub-paragraphs 9(2) - Uncertain tax treatment – provision in the accounts

4.1 The first trigger (or notification criterion) in sub-paragraph 9(2) of the draft legislation is clear and objective. Save that we suggest that the last line of sub-paragraph 9(2) should be changed from 'will be applied' to 'may be applied' to be properly reflective of the accounting treatment. A provision in the accounts does not necessarily mean the final accepted tax position will be in line with that provision.

5 Sub-paragraphs 9(3) - Uncertain tax treatment – HMRC's known position

5.1 As we noted in our response to the second consultation[2], although the basic concept behind the second notification criterion based on HMRC's known position is reasonable, defining it in legislation to give an objective test that businesses can comply with is more difficult. The draft legislation gives rise to a number of practical questions and it will be difficult for businesses to ascertain HMRC's known view, and, therefore, whether they have an uncertain tax treatment in all cases. These practical challenges are discussed more fully in our comments on the draft guidance. Given the potential breadth of the wording of the draft legislation, and how difficult it is going to be for businesses to deal with the requirement to notify uncertain tax treatments on a day to day/year to year basis, we encourage HMRC to make the guidance (and legislation) as clear as possible.

5.2 Taxpayers will be relying on HMRC's published guidance to determine HMRC's known position for the purposes of complying with this measure. We welcome that this measure is being taken as an opportunity for HMRC to look for further opportunities to improve their technical guidance, as per the government's policy paper published in July.

6 Sub-paragraph 9(4) - Uncertain tax treatment – Substantial possibility

6.1 The third 'trigger', which is based on an inevitably hypothetical view of what a tribunal or court might find to be incorrect in respect of a tax treatment is loosely drafted and poorly conceptualised. Its inevitably uncertain application undermines any potential efficacy of this measure.

[2] At paragraphs 6.2-6.6

6.2 The premise of the test is around the concept of a 'substantial possibility', but it is not at all clear (and the draft guidance does not assist as discussed in our comments on that) what is a 'substantial possibility' and how a business is supposed to measure it. Ultimately, the answer from a tribunal or court will be a binary one, but even that does not necessarily have any bearing on whether there was a substantial possibility of one result or another occurring. There are often surprising judgements reached by tribunals and courts. Thus businesses are being asked to use their judgment in working out if the incorrectness of the treatment is 'material' and if there is a 'substantial possibility' that the treatment might be found to be incorrect. Each of these concepts are imprecise.

6.3 The test in sub-paragraph 9(4) includes the concept of reasonableness in that the question is whether it is 'reasonable to conclude ….'. But the inclusion of the word 'reasonable' in this instance does not have the effect of making the test more objective. Rather, we suggest, it actually makes the trigger broader. Suppose out of ten advisers nine concluded that there was not a 'substantial possibility', but one concluded that there was – does that make the view that there is a substantial possibility a 'reasonable' one that the business would have to take into account and report on? The formulation of this test seems to us to be the opposite of the test in the general anti-abuse rule (GAAR). In the GAAR the test is that the taxpayer cannot reasonably take the view in question. This test here is whether it is reasonable to suppose that the taxpayer has got the tax treatment wrong.

6.4 We understand from discussions with HMRC that they are looking for tax treatments where the taxpayer is 60-70% sure that the treatment they are adopting is correct. Or, to put it another way, where the level of uncertainty is slightly below 50% - such that a provision in the accounts is not required, but is still 'significant' or 'substantial'. We understand why HMRC do not wish to put a figure on the level of uncertainty, either in the legislation or the guidance, but the uncertain nature of the resulting test in the draft legislation must be recognised. All large businesses will have different internal reporting criteria for risks that are below the level at which a provision is required in accordance with GAAP, and the task for the business will be to match up their subjective criteria with the imprecise test in the legislation. In discussing this trigger in their second summary of responses, HMRC refer to a similar requirement in Australia. However, the proposed test here is much broader than that in the Australian regime. A taxpayer might well see a 30% chance of losing as 'a substantial possibility'. In addition, the linking of the test to what a tribunal or court might find, makes this test more difficult to apply as litigation always has some element of a lottery.

6.5 Our conclusion is that this test is very poorly drafted and will likely be applied by large businesses that wish to be compliant at a much lower bar than we understand HMRC envisage or are seeking notification of. The practical result is probably that if it is discussing this test in relation to a tax treatment, an open and transparent business wishing to be compliant will ensure that either it notifies the tax treatment to HMRC or ensures that it has discussed the tax treatment with HMRC, to avail itself of the general exemption. This may be a satisfactory result from HMRC's perspective, although it could be challenging from a resource perspective, but it does not mean that it is good law.

6.6 This measure is 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 achieve this, or change the fundamental behaviour of those that do not wish to act in this way. It seems to us that the test within sub-paragraph 9(4) is sufficiently imprecise and uncertain to allow a large business that does not wish to be transparent to arrive at an arguable position that the test is not met in respect of its particular tax treatment. Thus HMRC may receive more notifications from large businesses that are already open and transparent in their dealings with HMRC, than from those businesses that are less willing to have a cooperative relationship with HMRC.

6.7 The test could also apply in circumstances where it is not intended to apply. For example, consider a business that is applying a tax treatment based on a known helpful HMRC interpretation, or indeed a published HMRC concession. Could this be caught by sub-paragraph 9(4)? There may be a substantial possibility that a tribunal or court would disagree with HMRC's interpretation or concessionary treatment, as a tribunal or court would always have to consider the law, and not HMRC's practice.

7 Paragraph 11 – 'Tax advantage' in relation to income tax or corporation tax

7.1 There is some ambiguity as to whether the definition of 'tax advantage' in relation to income tax or corporation tax in paragraph 11 includes the creation of a loss, or increase in a loss, since this would not necessarily result in 'relief from tax'. Therefore, it is not clear that an uncertainty relating to, for example, whether expenditure is deductible in a loss making period would be notifiable under the regime until a future period when the loss it utilised. It would be administratively very burdensome to have to track uncertain losses and notify uncertainties in future periods when the loss is utilised. We suggest that the definition of tax advantage is changed to ensure that it clearly includes the creation or increase of an allowable loss.

8 Paragraph 16 – General exemption

8.1 The general exclusion at paragraph 16 is intended to minimise the compliance burden for large businesses that are already open and transparent with HMRC, because they will often already have discussions with HMRC on matters that may now be considered uncertain tax treatments. To that end the exemption is welcome, and necessary. However, as we have explained in our responses to the consultations, and mention above, regardless of discussions that routinely take place between large businesses and their CCMs, there will inevitably be duplication of effort, notwithstanding this exemption. As a result, we anticipate that the measure will still impose a significant additional compliance burden on all businesses regardless of the policy intention of this exemption.

8.2 We also remain concerned about the parity of treatment between businesses that have a CCM and those that do not. As mentioned above, HMRC has not yet provided any detail as to how taxpayers without a CCM will be able to utilise the existing HMRC Customer Engagement Team to ensure there is an effective avenue for these large businesses to avail themselves of this exemption. This is discussed in more detail in our comments on the draft guidance.

8.3 Sub-paragraph 16(2) sets out some circumstances in which information is taken as being made available to HMRC, and has a list of regulatory requirements in sub-paragraph 16(2)(a). However, the legislation itself does not necessarily result in information that is provided under the regulatory requirements in sub-paragraph 16(2)(a) satisfying the general exemption in sub-paragraph 16(1). Sub-paragraph 16(2) merely says that the information provided under these is 'available' to HMRC. The draft guidance explains what HMRC considers made 'available' to HMRC means. Some of the statements in the draft guidance are not helpful if the intention is that, once a business has complied with the regulatory requirements listed in sub-paragraph 16(2)(a), they can be confident that no further notification is required in respect of the tax treatment(s) resulting from what is disclosed. This appears to be the intention from a statement in paragraph UTT18200 of the draft guidance that says that '*If a business provides information under these other regulatory requirements, they will be exempt from making a further notification.*'

8.4 We suggest that the legislation is amended to make this clear. As we discuss in our comments on the draft guidance, it is currently not clear that merely complying with the regulatory requirements listed will provide

the necessary information in a way that HMRC consider to be made 'available' to them in every case. The legislation should expressly say that if a business complies with the regulatory requirements listed, notification is not required in respect of any tax treatments that may flow from the matters/transactions that HMRC is informed about under those requirements.

8.5 We also suggest that the list of regulatory requirements in sub-paragraph 16(2)(a) is amended to include a reference to applications for approval of partial exemption special methods that are given pursuant to VAT Regulations 1995 regulation 102. This is a particularly difficult area for taxpayers that generates uncertainty around VAT treatment for some considerable time, as it often takes many months (often as many as 18 months, and in some cases even longer than this) to obtain the approval from HMRC in respect of a new or changed partial exemption special method. We suggest that once a business has contacted HMRC about a new or changed partial exemption special method HMRC is 'put on notice'. HMRC should be able to follow up with regard to any questions about any uncertain tax treatment which may result from the definition in this legislation (either as a result of the old partial exemption method that is being changed, or the new one being applied in certain circumstances prior to approval being given). As such further notification from a business about these tax treatments should not be necessary or required.

9 Discovery rules and time limits for assessments

9.1 We would welcome some clarity around how this compliance measure interacts with the rules dealing with discovery assessments. The point is whether a business's notification will count towards protecting it against HMRC later trying to issue a discovery assessment if it transpires that too little tax was paid in relation to the uncertain tax treatment (and HMRC did not open an enquiry). Our view is that the business has given HMRC the information so that information should count towards protection from discovery. It seems to us that HMRC has indicated that it broadly agrees – see paragraphs 3.93 and 3.94 of the responses to the first consultation. However, the draft legislation does not deal with this.

9.2 Both income tax and corporation tax are subject to discovery assessment legislation that broadly says HMRC can assess additional tax (within its assessment time limits) if either:

- an under-assessment arises which is caused by careless or deliberate behaviour of the corporate or someone acting on their behalf; OR
- at the point HMRC ceased to be able to open a self-assessment enquiry, HMRC could not reasonably be expected to be aware of the under-assessment based on the 'information made available' (as defined in the legislation).

But the above do not apply if the return was prepared in accordance with generally accepted practice.

9.3 The issue is that the existing discovery assessment legislation contains a list of the documents that are relevant when the 'information made available' test noted in the second bullet point above is considered. If something is not on the list then case law to date generally shows that its existence is ignored when deciding if HMRC could issue a valid discovery assessment.

9.4 The draft notification of uncertain tax treatment legislation does not say that the notification required to be given to HMRC will be within the relevant return: for example, the corporation tax return or partnership return that the uncertain tax treatment relates to. Rather, the notification will be a separate document entirely (as per sub-paragraph 8(5) of the draft legislation, and expanded on in the draft guidance), and does not have to be submitted with the return itself. It seems, therefore, that TMA 1970 section 29(6)(a)-(c) will

not cover the notification of the uncertain tax treatment and, whilst section 29(6)(d) might cover it, we suggest that it would be better to put the point beyond doubt so that the point does not need to be considered by a court in due course.

9.5 We suggest, therefore, that the draft legislation introducing the notification requirement should include a new clause which will amend TMA 1970 section 29(6) to add a new point to the effect:

'*it is contained in the taxpayer's notification of uncertain tax treatment under paragraph 8 of [the notification of uncertain tax treatment schedule] or in the information provided to HMRC which is referred to at paragraph 16(1) of that schedule*'.

The latter bit of this suggested amendment, after the 'or', is intended to cover any informal notifications to HMRC that then mean a formal notification of uncertain tax treatment is not required.

9.6 This suggested amendment to TMA 1970 section 29 should cover partnership returns by virtue of TMA section 30B(7). A similar new clause will be needed for the corporation tax equivalent of section 29(6), that is to say a similar amendment to FA 1998 Schedule 18 paragraph 44(2).

9.7 A similar amendment will be required in respect of PAYE and VAT. We suggest that this is dealt with by an amendment to the regulations dealing with those taxes.

9.8 A discussion around discovery should also be included in the guidance.

10 Part 3 Penalties

10.1 We note in our comments on the draft guidance that UTT19500, relating to appeals against penalties, refers to appeals to the First-tier Tribunal. It does not refer to statutory reviews. We would welcome clarification as to whether it is HMRC's intention to prevent corporates using statutory reviews as envisaged by Taxes Management Act 1970 ss49A-49G. HMRC statistics demonstrate that statutory reviews can be an efficient, cost effective way to resolve reasonable excuse based appeals. If statutory reviews are to be permissible paragraph 24 of the draft legislation, as well as the draft guidance on this point, would need amending. In addition, have HMRC considered whether there is a place for alternative dispute resolution (ADR) in relation to resolving disagreements that may arise as to the application of this measure?

10.2 Paragraph 25 of the draft legislation is not consistent with the position in regard of assessment of penalties set out in the draft guidance. Paragraph UTT19330 of the draft guidance says 'A penalty payable by a company is enforceable as if it were corporation tax charged in an assessment. A penalty payable by a partnership is enforceable as if it were income tax charged in an assessment.' This is not reflected in the legislation. We suggest that either the guidance or the legislation needs to be changed. FA 2008 Schedule 41 paragraph 16(3) could be used if HMRC wish the position to be as per the draft guidance.

11 Acknowledgement

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

The Chartered Institute of Taxation
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