



Response from ICAS

Notification of uncertain tax treatment by large businesses

27 August 2020

About ICAS

1. The Institute of Chartered Accountants of Scotland ('ICAS') is the world's oldest professional body of accountants. We represent over 22,000 members working across the UK and internationally. Our members work in the public and not for profit sectors, business and private practice. Approximately 10,000 of our members are based in Scotland and 10,000 in England. ICAS has a public interest remit, a duty to act not solely for its members but for the wider good.
2. The following submission has been prepared by the ICAS Tax Board. The Tax Board, with its five technical Committees, is responsible for putting forward the views of the ICAS tax community; it does this with the active input and support of over 60 committee members.

General comments

3. ICAS welcomes the opportunity to respond to the consultation, Notification of uncertain tax treatment by large businesses, issued by HMRC on 19 March 2020.
4. The consultation is taking place at Stage 2 of the process set out in the Tax Consultation Framework. It is unclear why Stage 1 – setting out objectives and identifying options - has been omitted. It would have been preferable to have started at Stage 1, with a clear explanation of what HMRC wants to achieve and the problem it is seeking to address. This would have provided an opportunity to identify options that do not impose unnecessary burdens on all large companies and partnerships – unlike the proposals set out in the consultation.
5. Feedback from our members working for large corporates, or advising them, indicates that the Business Risk Review process and the associated collaborative working with HMRC, mean that these companies already proactively disclose any areas of uncertainty to their CCM. Most want to engage with HMRC in real time to address uncertainty – but HMRC resource constraints already mean that this is not always possible. We are concerned that the impact of the proposed requirement on HMRC resources could adversely affect collaborative working and make it harder for some large businesses to achieve the real time engagement they would like.
6. Paragraph 2.1 of the consultation document states:

“Having accurate and timely information to inform our interventions, and the chance to constructively discuss that information with the customer, significantly increases the speed and efficiency of the intervention – bringing benefits for both parties.”

In our experience most large companies and partnerships already seek to provide accurate and timely information and want the opportunity for constructive discussion with HMRC. The new Business Risk Review process (once fully embedded) should enable HMRC to identify which businesses do not adopt this approach and therefore present a problem.

7. Paragraph 2.1 also notes that HMRC's approach is not to disadvantage the 'compliant majority'. The proposed notification requirement will impose additional costs and administrative burdens on the majority of compliant large businesses, due to the subjective and unclear nature of the definition of uncertain tax treatment and the resulting risk of inadvertently failing to notify. Many will take a prudent approach in making notifications, which will tie up HMRC resources and is unlikely to assist HMRC in identifying cases which do require close scrutiny.
8. We believe that the measure should instead be targeted at the minority of businesses which do not engage constructively with HMRC. This could be achieved by providing that businesses would only be within the notification regime where they receive a high risk rating under the new BRR - and/or providing that businesses will only be within the regime where HMRC issues a notice or direction.
9. The assessment of impacts suggests that the predicted yield from the measure is very small compared to the 'legal interpretation gap' of £6.2 billion or to the size of the large businesses currently within scope. It appears likely that the intended target of the proposals is a small number of entities. This reinforces our view that the measure should be better targeted.
10. If a more targeted approach is not adopted, we believe it is important that the definition of uncertain tax treatment is changed to something clearer and more objective and that some form of materiality threshold is introduced.

Specific questions

Question 1 - Do you think the suggested threshold criteria are suitable for the requirement to notify?

11. We agree that the requirement should only apply to large businesses. The criteria proposed, particularly those used for the SAO regime, would be reasonable. However, we believe the measure should be more targeted than is currently proposed and should not apply to all businesses within the 'large' category – only those which do not engage constructively with HMRC and present a high risk. We suggest that businesses should only be within the regime where they receive a high risk rating under the new BRR - and/or where HMRC issues a notice or direction.
12. In order to allow better targeting through the BRR process, every entity within scope of the measure should have an HMRC CCM. Paragraph 2.15 of the consultation makes clear that where this is not the case (presumably for some groups in Mid-Sized Business referred to in 2.10) an HMRC contact point will need to be available anyway: it would be preferable to bring these businesses into the BRR regime with a CCM.
13. Without more targeting we do not believe that all the taxes in scope for the SAO regime should be in scope for the notification requirement – at least initially. It would be easier to devise a workable regime if it only covered a smaller number of taxes, so that the approach could be more tailored, and the administrative burden reduced. We would expect corporation tax to be included and HMRC presumably has data from its work on the Tax Gap and from the BRR process which could inform the choice of other taxes.

Question 2 - Do you think there are any other areas that should be excluded from the notification regime?

14. We do not believe the proposal in paragraph 2.15 is realistic. Feedback from our members working for large corporates, or advising them, indicates that these companies already proactively disclose any areas of uncertainty to their CCM. Most want to engage with HMRC in real time to address uncertainty – but HMRC resource constraints already mean that this is not always possible. It is not clear what would qualify as a 'formal discussion' beyond the example given (formal enquiry). Would a list of items for discussion at a meeting qualify? Where issues are discussed at meetings with CCMs, our understanding is that there is often already a significant time lag before HMRC confirm meeting notes – would confirmed, detailed notes be required?
15. The addition of a requirement for HMRC to agree in writing that they have sufficient information in advance of the deadline for disclosure – for every possible uncertain tax position – does not appear to be achievable without a significant increase in HMRC resource. We are also concerned it would divert HMRC resources away from constructive real time engagement with companies.
16. Combined with the uncertainty around what should be reported (which we discuss further below), we envisage that HMRC will receive many disclosures from compliant companies which cover areas already discussed with CCMs, or where information has been supplied. Repeat disclosure will be simpler than trying to obtain formal confirmation that HMRC has sufficient information on every potential issue – but the other possibility is that compliant businesses will put pressure on CCMs to provide formal written confirmation.
17. This is unlikely to help HMRC to identify disclosures that do need scrutiny, which are likely to be from higher-risk entities – although some of these may extend their lack of constructive engagement with HMRC to the notification regime. HMRC time would be better spent concentrating on the small number of higher-risk entities which do not want to adopt collaborative working, rather than sifting through disclosures from compliant companies or providing them with confirmations that sufficient information has been disclosed.

Question 3 - Do you think the definition and principles in IFRIC23 are appropriate to be used for the requirement to notify?

18. IFRIC 23 differs from the proposal in the consultation document because it requires an assessment of whether it is probable that a taxation authority (including a court) would accept an uncertain tax treatment, ie it looks at the ultimate outcome. As the consultation recognises this is not the same as the proposed requirement to disclose uncertainties which HMRC is likely to challenge. IFRIC 23 also

does not cover the same range of taxes as proposed for the notification measure – and materiality is built into the assessment under IFRIC 23.

19. Compared to IFRIC 23 the definition of uncertain tax treatment in the proposed requirement is too subjective and unclear. Companies which consider IFRIC 23 for their accounts would have to consider additionally whether HMRC would be likely to challenge something – even if they consider that the treatment adopted would ultimately be upheld by the courts. There could apparently be a breach of the notification requirement even in cases where the courts did ultimately uphold the approach adopted – because clearly HMRC would have made a challenge. Combined with other aspects of the proposals, this is likely to lead to disclosures HMRC do not want, from entities erring on the side of caution.
20. The consultation document also mentions regimes in Australia and the USA. Our understanding is that these only apply to corporate taxes and the criteria for triggering a notification are more objective; it is therefore much clearer when notification is required.
21. It would be preferable if the UK requirement covered a smaller number of taxes and included a more objective definition of uncertain tax treatment, ie more in line with IFRIC 23 and the Australian/US approaches.

Question 4 - Do you think there would be any problems with the person considering whether notification is required, being different to the SAO?

22. We believe that determining the tax treatment to be adopted is the responsibility of the company – not any one individual. In large groups this will involve many people and discussions at different levels of the organisation. The notification requirement should therefore be placed on the company.
23. Corporate tax returns need to be signed by a person authorised by the company; a similar approach should be adopted for the proposed notifications.

Question 5 - Do you think the proposed de minimis threshold of £1m is reasonable for the notification of uncertain tax treatment?

24. Whilst we note the comments in the consultation about the reasoning behind the proposed de minimis £1m threshold, we believe this will cause significant problems for many large entities. Paragraph 3.14 refers to the need for effective monitoring of the multitude of small cases that can add up and be material. However, we do not see how this could be achieved without imposing disproportionate burdens – it is not practical for very large entities to look at every small transaction. We also question how useful information at this level will be to HMRC.
25. Paragraph 3.13 refers to the principles of IFRIC 23, but far more issues would need to be considered in assessing whether a notification is required – and materiality is built into IFRIC 23. It is also proposed that the notification requirement should cover more taxes. There would need to be detailed guidance on measurement – for example, if the uncertain tax treatment only results in a timing difference, how should that be calculated when considering the threshold?
26. If a de minimis threshold is included in the notification regime there should be provision for it to be regularly reviewed and increased – or for it to be indexed – so that it remains fit for purpose.

Question 6 - Do you believe there are strong arguments for a materiality threshold?

27. Yes. To make the notification proposals workable – for HMRC and large businesses – materiality cannot be ignored. As paragraph 3.15 notes, the Australian notification regime does include a materiality threshold. It also does not cover the wide range of taxes which the UK proposes to include – as outlined in paragraph 3.17 a method which works for CT may not work for VAT or other taxes.

Question 7 - Do you envisage problems determining the £1m threshold for indirect taxes, particularly VAT?

28. Yes – we anticipate problems for VAT. Some of these will be practical: for example, it would be very onerous to have to record every disagreement with a supplier and to determine whether these would need to be aggregated – but a dispute would indicate uncertainty, so is that what HMRC would require?

29. The position will vary for different sectors. In the property sector, a single construction project could breach the threshold; this would be easy to identify. However, for other sectors, it could be the aggregation of thousands of transactions that gives rise to a breach of the threshold. Are these individual areas of uncertain tax treatment or a single uncertainty?
30. There are also questions around measurement and the £1 million threshold:
31. How should the reference to 'tax outcome' in paragraph 3.13 of the consultation be interpreted in the context of VAT? For example, if a supply is treated as exempt – but should have been a taxable supply – additional output VAT would be due. However, for a partially exempt business there would also be an increase in input VAT recovery. We assume that if the net effect is below £1 million, notification would not be required – is that HMRC's view?
32. Where partial exemption special methods are in point, the process for agreeing a PESM means that detailed information will be disclosed to HMRC at the outset. Subsequently business activities might change, or an issue might be identified - so the business would seek to discuss and agree an updated PESM with HMRC. This can take a long time and until agreement was reached there would be some uncertainty. Would HMRC expect the business to make a notification of uncertain tax treatment, even though detailed information would already have been supplied in support of the new PESM application?
33. How should the threshold be approached for issues where the effect will be spread over a number of years? If the VAT treatment of a new product or service is determined by a business in year 1, but is considered to be uncertain, should it be notified then because it is expected that over time the £1m threshold will be reached – or only at some later date? We understand that it can be difficult to obtain rulings from HMRC in a reasonable timeframe.
34. As a result of the transition from oil and gas to lower carbon energy, we understand that numerous questions are being raised with HMRC about the VAT and duty treatment of certain new energy goods and services. Existing legislation does not cover these and there are no precedents. Discussions with HMRC are often taking more than a year – but the initial values will be immaterial (for example, electric vehicle charging). Would notification be required – if so when? Or would formal confirmation from a CCM and/or a VAT officer be needed to demonstrate that the issue has been fully disclosed as part of ongoing discussions?

Question 8 - If so, can you suggest how these problems could be mitigated?

35. For industry wide issues, such as the electric vehicle charging example above, we suggest that HMRC should establish and maintain a register of "known issues" that are being worked on (for example, with industry bodies or HMRC stakeholder groups); these should then be treated as outside the scope of individual notification until HMRC's view of the treatment has been determined and announced.

Question 9 - Do you consider that it would be beneficial to supplement the main requirement with a specific list of indicators of uncertainty?

36. The definition of uncertain tax treatment lacks clarity and needs to be made clearer and more objective. We do not believe a list of indicators, is an acceptable substitute for improving the definition and ensuring that the legislation provides clarity. The examples of indicators given in paragraphs 3.21 and 3.22 demonstrate the problems arising from the lack of clarity around what HMRC is looking for.
37. For VAT, in the context of 3.21, is HMRC expecting large businesses to monitor all First Tier Tribunal decisions to identify where new potential areas of uncertainty will arise? We suggest instead that where HMRC is aware of a significant issue it should issue a Revenue and Customs Briefing and add the uncertainty to a rolling list (similar to [HMRC's list of VAT appeals](#)). A large business would then notify the area of uncertainty (where the threshold is exceeded), referring to the reference number on the HMRC list.
38. The examples in 3.22 are insufficiently specific and could prompt unwanted notifications where the treatment seems clear but companies do not wish to risk an inadvertent failure to notify: it does not seem likely that HMRC would want disclosures of every matter involving the capital/revenue divide, or would want CCMs to be provided with information on every example and asked to confirm that it was sufficient.

39. Paragraph 3.22 includes a VAT example: “a change of rate of goods or services from the standard rate to a non-standard rate”. It seems likely that in this scenario a retrospective claim for overpaid VAT would be submitted, rather than simply making a prospective change in treatment. Would that be treated as notification?
40. Rather than trying to provide lists of indicators for the notification requirement, it would be helpful if HMRC improved its guidance in general – and ensured that it is updated more quickly – to assist businesses in determining when they might be adopting a treatment that is likely to be challenged. We have received reports of problems with guidance on new legislation.
41. We are also aware of instances where HMRC’s interpretation has changed, or HMRC has provided a view on a new issue: some businesses are aware of HMRC’s current view but there is often a significant delay before official guidance is properly updated or a Revenue and Customs Brief is issued. How can other businesses be expected to be aware that there may be uncertainty, until HMRC issues or updates guidance?

Question 10 - Do you agree with the proposed examples, and do you have any others which you consider would be helpful?

42. See our response to Question 9. More clarity is needed from HMRC about what it is seeking to achieve. HMRC also needs to ensure that all businesses have access to up to date guidance about potential areas of uncertainty.

Question 11 - Do you think the SAO certification process is appropriate for the notification requirement?

43. As outlined in our response to Question 4, the responsibility for making notifications should not rest with one individual. Any link to the timing of the SAO process would also be problematic – different processes and people would need to be involved in determining whether notifications should be made. For corporation tax final decisions on notification could most easily be considered when preparing and filing the corporate tax return – this would require a later deadline for notification than for the SAO certification.
44. We do not necessarily agree that a single deadline for notifications for all taxes, i.e. something similar to the SAO regime, is the best approach. It might appear to simplify the administration but in practice it is likely that having the same deadline for corporation tax (one annual return) as for PAYE/VAT (more frequent returns) and SDLT (specific transactions) will present problems. We have not considered the other taxes currently proposed to be in scope.
45. We suggested in our response to Question 1 that, at least initially, it would be preferable to restrict the notification requirement to a smaller number of taxes to allow for more tailoring of the requirement to reduce the administrative burden. We assume that corporation tax would be one of these taxes; a sensible reporting deadline for CT notifications would be the filing date for the CT return, or slightly later to allow for data collation/preparation of the notifications.

Question 12 - Would reporting VAT and PAYE issues occurring in the tax year, rather than in the accounting period for the company, cause any significant difficulties?

46. See our response to Question 11. We believe different reporting deadlines might be more practical for VAT and PAYE. However, there should not be a requirement for more than one notification report per year, for either VAT or PAYE. For VAT, the SAO certification deadline might be workable.

Question 13 - What alternative person could be responsible to make the notification for large partnerships?

47. The representative partner responsible for filing the partnership return.

Question 14 - Alternatively, what process (other than the SAO) could be used for a single, annual notification?

48. See our response to Question 11. We do not believe the SAO process is appropriate, or that a single annual notification for all taxes is necessarily the best approach. This requires further consideration once the taxes within scope have been confirmed.

Question 15 - For each relevant tax, what information do you think could be reasonably provided as part of the notification requirement, in addition to a concise description and indication of amount?

- 49. Due to the lack of clarity around HMRC's objectives and the definition of uncertain tax treatment, it is difficult to give a response to this question.
- 50. As noted in our response to Question 2, feedback from our members working for large corporates, or advising them, indicates that they already proactively disclose areas of uncertainty to their CCM and seek to provide accurate and timely information as part of that engagement. They cannot see what else they could provide.
- 51. As outlined elsewhere in this response, our concern is that unless the notification is targeted at the minority of non-compliant entities and/or more clarity is provided around what HMRC is seeking to achieve, the outcome will be to impose significant administrative burdens on the compliant majority and to generate unnecessary reports which will not assist HMRC.
- 52. As the proposals stand, notifications should be restricted to a concise description and indication of amount.

Question 16 - Do you think there are any common disputes, that due to the complex nature of such disputes, where specific documents or information should be provided alongside the notification?

- 53. See our response to Question 15; we believe there are fundamental issues with the proposals which need to be addressed. On the basis of the current proposals we believe that if HMRC requires further information, having assessed notifications submitted, it should use its powers in the usual way to obtain this. We do not currently see that there are any areas where a blanket requirement to provide additional information would be appropriate.

Question 17 - Do you think the principle and quantum of the existing SAO penalty regime is sufficient for the integrity of the notification requirement?

- 54. We agree that the principle and quantum of the SAO regime would be sufficient. The compliant majority will want to comply with the requirement, regardless of the quantum of the penalties, so we foresee over-reporting to avoid inadvertent failures to notify. If the proposals were amended to target the non-compliant minority, as we have suggested, consideration could be given to whether higher penalties would be appropriate.

Question 18 - Regarding the penalty in 6.3.2, who do you think should be liable to a penalty, the person liable to notify or the entity, and, if more than one (legal) person, in what circumstances, and to what quantum, would these persons be culpable/liable?

- 55. In line with our response to Question 4, any penalty arising from a failure to make a notification should not be the personal liability of one individual.
- 56. Determining the tax treatment to be adopted is the responsibility of the company (or other entity within scope) and the company should be liable for any penalties arising from failures to meet the notification requirement.
- 57. It would be useful for HMRC to give guidance on how the notification requirement would interact with the wider penalty regime. For example, we assume that a notification would be treated as an unprompted disclosure.

Question 19 - Do you have any comments on the assessment of equality, and other impacts?

- 58. The assessment of impacts suggests that the predicted yield from the measure is only £45m by 2023/24. This is very small compared to the 'legal interpretation gap' of £6.2 billion or to the size of the large businesses currently within scope. It appears likely that the intended target of the proposals is a small number of entities. This reinforces our view that the measure should be better targeted. We do not consider that the expected yield justifies imposing an onerous requirement on all large companies and partnerships.

59. We note the comment in the impact assessment that HMRC will require additional resources to consider the notifications and caseworkers to enquire into them.
60. It is clear from paragraph 2.15 of the consultation that there will need to be contact points for some groups dealt with by Mid-Sized Business. As set out in our response to Question 4, we believe that these groups should have CCMs and be brought within the BRR process. It is also likely that CCMs will need to deal with additional requests for discussions about issues which might fall within scope of the requirement – and with requests for formal confirmation that sufficient information has been provided. Significant additional CCM resource will therefore be required.
61. We would like to understand whether the comment in the impact assessment means that new resources will be provided – or will existing resources be diverted? How many new CCMs and caseworkers will be available?
62. As set out in our response to Question 9, it would also be helpful for HMRC to improve its guidance and ensure that it is updated more quickly – to assist businesses in determining when they might be adopting a treatment that is likely to be challenged. This will also require additional resource.
63. We are concerned that unless HMRC is provided with significant additional resources, particularly CCMs, the proposals as they stand will have an adverse impact on collaborative working between HMRC and large businesses. Feedback we receive indicates that some large businesses are already encountering difficulties, due to HMRC resource constraints.