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Advance tax certainty for major projects

Response from ICAS

Advance tax certainty for major projects

1. The Institute of Chartered Accountants of Scotland ('ICAS') is the world's oldest professional body of accountants. We represent over 24,000 members working across the UK and internationally. Our members work in the public and not for profit sectors, business and private practice. Approximately 11,500 of our members are based in Scotland and 10,000 in England and Wales.
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.
3. ICAS has a public interest remit, a duty to act not solely for its members but for the wider good. From a public interest perspective, our role is to share insights from ICAS members into the many complex issues and decisions involved in tax and regulatory system design, and to point out operational practicalities.

General comments

4. We welcome the opportunity to respond to the HM Treasury consultation '[Advance tax certainty for major projects](#)'.
5. We believe that the proposals do have the potential to produce some positive impact on business investment. The proposed clearances appear to be aimed primarily at energy and infrastructure sectors (with high levels of capital expenditure) but we understand that those in the telecoms and technology sectors also see potential for using the process.
6. Whilst we support the principle behind the proposals, we note that the threshold for accessing the clearances is set at a very high level which will exclude the majority of businesses. Major projects are obviously important but there is scope for significant growth to come from the expansion of mid-sized entities which also need certainty when considering future investment. Concerns have been raised with us that large businesses already receive considerable support from HMRC (for example, from Customer Compliance Managers (CCMs)). We would like to see investment by HMRC in improving some of the existing routes to certainty, which would help a much wider range of businesses.
7. Specifically, we would like to see improvements to the current non-statutory clearance (NSC) process to make it more useful. We receive feedback that a major barrier to using NSCs is the requirement for there to be 'genuine uncertainty'. Frequently businesses believe there is uncertainty and devote time and effort to applying for a clearance, but the request is rejected by HMRC on the basis that the position is clear – leaving businesses with no route for obtaining certainty.
8. It would also be helpful if the temporary CCMs service for mid-size businesses could be expanded, with the extra resource focusing on supporting expansion.
9. Introducing this new regime, or improving the existing NSC process, will not address the need for greater legislative clarity and stability. For example, there have been numerous changes in the energy sector in the last few years. Constant tax changes do affect investment decisions. As illustrated by the Gunfleet Sands/Orsted case, there are also issues when there is prolonged uncertainty about the treatment of significant expenditure in a sector because of disagreement (and litigation) over the interpretation of complex rules.
10. We do not support charging fees for the proposed advance certainty clearances. There is a risk that this could be perceived as affecting HMRC's impartiality - large businesses paying a fee for preferential treatment.
11. Given the size of the projects within scope, a fee is unlikely to be a material consideration, but if the government wants to encourage growth, charging to provide certainty may not be seen as supporting businesses in reaching investment decisions.

Specific Questions

Chapter 2: Eligibility

Question 1: What is the impact of giving eligibility to corporate entities that are or will be subject to CT and are directly undertaking major investment projects? Does this exclude any other structures investing in major projects which would significantly benefit from being in scope?

12. The proposed restriction of eligibility to corporate entities directly undertaking major projects, could exclude some significant potential investors. We have received feedback that it is not uncommon for major projects to be carried out through partnerships or LLPs, so we suggest expanding eligibility to include these.
13. Consideration could also be given to bringing pension funds and Sovereign Wealth Funds within the scope of the regime.

Question 2: How can advance tax certainty provide material wider benefit beyond the entity receiving the clearance?

14. We have no comments on this question.

Question 3: What is the best way of quantifying the fixed and intangible investment for the purposes of assessing whether a project meets the threshold? Do you agree that authorised project spend is a suitable metric?

15. As indicated in the consultation, the advantage of a clear quantitative threshold is that it would provide some clarity for applicants. However, the comments about preventing 'inappropriate bundling' and abuse of the process, suggest that HMRC's evidence requirements to support the figure for authorised project spend, could potentially be onerous.

Question 4: Is there a set amount of expenditure that would prompt you to seek a clearance or certainty, or would this be more attributable to the amount of tax and uncertainty in treatment?

16. This would depend on the materiality for specific applicants, but we would expect that the amount of tax potentially in question, and the level of uncertainty would be the key drivers, rather than the amount of the expenditure.

Question 5: Are there supplementary criteria, which are objective and measurable, which could capture projects below the quantitative threshold which are nevertheless of a national or strategic importance, are highly impactful on a relative basis within their sector, or that have large growth potential despite starting small?

17. As set out in our general comments, there is scope for significant growth to come from the expansion of mid-sized entities. Some of these are likely to be involved in projects with large growth potential, or with a potential high impact in their sector. However, it is difficult to suggest objective and measurable criteria which could capture these. It also seems likely that the requirements for evidence to support applications would be challenging.
18. As suggested in our general comments, an alternative to trying to bring these projects within scope of the proposed advance certainty clearances would be to improve and/or expand existing clearance routes (specifically the NSC process and the temporary CCMs service) so that they offered a route to obtaining certainty for mid-sized entities.

Chapter 3: Scope

Question 6: In which areas of UK tax legislation would advance tax certainty have the most impact on investment decisions? Where possible please give examples of where lack of certainty has had a negative effect on an investment decision.

19. If the intention is to encourage investment, the process should cover all the business taxes - corporate, indirect and employment taxes. It should also cover environmental taxes – particularly if the proposal is aimed at investment in energy projects.

20. We have received specific feedback that it should cover the Construction Industry Scheme (CIS). This is often relevant for major investment (particularly inbound investment). There can be large penalties in certain circumstances (even if there is no loss of tax), so certainty would be useful.
21. For corporation tax, one key area would be deductibility of expenditure. In some sectors, the availability of capital allowances may also be significant – as noted in our general comments, the ongoing uncertainty caused by the Gunfleet/Orsted case is unhelpful. However, it seems unlikely that an advance clearance would help in circumstances similar to Gunfleet/Orsted – given that HMRC has applied to take the case to the Supreme Court, so would presumably refuse to give a clearance based on the Court of Appeal decision.

Question 7: Are there areas for which certainty would be of value that are not currently addressed by the non-statutory clearance process? What do you see as potential benefits and barriers to their inclusion?

22. As outlined in our general comments, we would like to see improvements to the current NSC process to make it more useful. We receive feedback that a major barrier to using NSCs is the requirement for there to be 'genuine uncertainty'. Frequently businesses believe there is uncertainty and devote time and effort to applying for a clearance, but the request is rejected by HMRC on the basis that the position is clear – leaving businesses with no route for obtaining certainty.

Question 8: Who do you consider should be bound by an advance certainty clearance and to what extent. What form should that take?

23. We agree that HMRC should be bound by an advance certainty clearance (as long as the project remains consistent with the key assumptions).
24. It is difficult to see how a taxpayer could be bound by the clearance, as the clearance would only be setting out HMRC's interpretation of the relevant legislation. This should be open to challenge in the normal way.

Question 9: What are the circumstances under which you consider it important to be able to continue to rely on a clearance?

25. It would be helpful to have some flexibility, where there are minor changes to the commercial fact pattern. For example, the applicant could have the ability to give an update to HMRC to obtain confirmation that the clearance can continue to be relied upon. Where the decision-making timescale is short, confirmation might be required very quickly; we discuss this further in our responses to Questions 11 and 14 below.
26. As set out in our response to Question 17, this updating process could be extended to cover any changes to the fact pattern/key assumptions after the clearance has been issued, rather than having a formal renewals process at a fixed point in time.

27. Chapter 4: Process

Charging fees

28. As set out in our general comments we would not support charging fees for the proposed advance certainty process. There is a risk that this could be perceived as affecting HMRC's impartiality - large businesses paying a fee for preferential treatment.
29. Given the size of the projects within scope, a fee is unlikely to be a material consideration, but if the government wants to encourage growth, charging to provide certainty may not be seen as supporting businesses in reaching investment decisions.

Question 10: Do you consider that an early engagement facility would be helpful and why?

30. Yes, we believe this would be helpful. Businesses will not want to devote time and resources to completing the application, only to find that they are not eligible for this type of clearance – or that another route to clearance should be used for the area in question.

31. The proposed early engagement facility would allow businesses to clarify that it would be worthwhile applying for a clearance. It would also allow HMRC to point to an alternative route, where relevant.

Question 11: How would this process work with typical commercial decision-making timescales?

32. We envisage that businesses are often likely to want a clearance at a time when they have not decided to commit to a project – the clearance will be part of the decision-making process. Part of the early engagement facility (and any scoping meetings, as discussed below) should be to identify what would be an acceptable timeline from the commercial decision-making perspective, and to establish whether HMRC will be able to provide clearance within that timeline.

Question 12: What facility would be helpful for unsuccessful clearance applications? Do you consider for example that the process should include reconsideration by HMRC on request?

33. It might be preferable to encourage usage of the early engagement facility to avoid businesses making unsuccessful applications which will waste time and resources for both businesses and HMRC. Ideally, applications should only be prepared and submitted where there is near certainty that they will be accepted.

Question 13: Do you consider a scoping meeting to obtain clarity on scope of clearance, timing and inputs to be useful? What would a scoping conversation need to include?

34. Yes, we believe this would be useful. We agree with the comments in the consultation that these meetings would facilitate discussion of timelines, further information required, priority areas and any refinements to scope, so that clearances which are taken forward are valuable to the applicant and deliverable by HMRC in an acceptable timeframe.

Question 14: Are there process elements you would consider helpful during the clearance consideration phase?

35. The consultation suggests (paragraph 4.14) that in some cases the clearance process may not be completed by the filing date. This seems unhelpful and could deter businesses from applying for clearances, particularly where the clearance will be part of the decision-making process for the proposed project. Businesses (and investors) may view the process as too slow or uncertain to add practical value.
36. As set out in our responses to Questions 11 and 13, the early engagement facility (and scoping meetings) should be used to identify what would be an acceptable timeline from the commercial decision-making perspective, and to establish whether HMRC will be able to provide the clearance within that timeline. Businesses might decide not to proceed with applications if it is unlikely that HMRC will be able to deliver the clearance in their commercially relevant timeframes.
37. Paragraph 4.13 states that the clearance team will include deep technical specialists and policy leads, where relevant (and CCMs, where these are in place). We have had feedback that there can be issues where different HMRC teams/specialists do not agree and give conflicting decisions. We assume that having relevant specialists (and CCMs) involved in the clearance team should prevent this happening, but the team will need to be managed effectively to prevent internal HMRC disagreements delaying the issue of clearances.

Question 15: What do you consider the advantages and disadvantages of publishing summarised and anonymised clearances to be? Has publication by other clearance jurisdictions aided tax certainty as a result?

38. We envisage that it might be difficult to anonymise some clearances effectively due to the size and significance of the projects involved. Either the identity of the applicant might remain ascertainable, or the published version might be hard to understand if too much detail has been removed.
39. As noted in our response to Question 11 above, businesses are often likely to want a clearance at a time when they have not decided to commit to a project – the clearance will be part of the

decision-making process. If the clearance is obtained but the project subsequently does not go ahead, a business might find it unhelpful if a published clearance was not properly anonymised. This could act as a deterrent to using the clearance process.

40. However, as outlined in paragraph 4.19 of the consultation, delayed publication, and the opportunity for businesses to review and agree to the proposed summary might address many concerns.
41. We agree that (as suggested in the consultation) there could be benefits from publication, particularly in improving policy understanding and consistency. However, some areas would need clarification.
42. It seems likely that published clearances would be another source that businesses within the scope of the notification of uncertain tax treatment requirement (NUTT) would need to consider. If that is the case it would be helpful if HMRC guidance (manuals/Guidelines for Compliance, for example) cross referred to relevant clearances. Potentially, HMRC's views set out in clearances should be incorporated into other guidance, wherever possible. It is not helpful for taxpayers to have to look in several different places to obtain a complete picture of HMRC's approach to a particular issue.
43. The consultation notes that other taxpayers would not be able to rely on a published clearance. However, taxpayers would presumably be expected to consider relevant clearances (or in the case of NUTT would be required to consider them, when considering HMRC's known position). This could cause problems if an issue covered by a published clearance is subsequently the subject of a court decision, where the court disagrees with HMRC's view as set out in the clearance.

Question 16: What would you wish to see in terms of engagement for clearances where impacted post issuance by legislation, ownership, case law or key facts and assumption changes?

44. As set out in our general comments, we do not believe that the proposed clearances (or improving the existing NSC process) will address underlying issues around legislative clarity and stability. Frequent changes to tax legislation are unhelpful and can affect investment decisions.
45. We agree that it would be essential for HMRC to work with clearance recipients, as outlined in paragraph 4.21 of the consultation. However, this will not address concerns about changes in the law over the life of the project.

Question 17: What should a renewals process look like, and is 5 years an acceptable trigger point?

46. Given the size of the projects that will be within the scope of the clearance regime, this seems quite a short period. It is unclear why businesses should have to 'renew' clearances at a fixed point in time if the fact pattern and key assumptions have not changed.
47. Chapter 3 of the consultation sets out circumstances where HMRC would not be bound by clearances and it seems to be envisaged that businesses would need to seek assurance from HMRC that they could continue to rely on the clearance if there had been any changes in the key assumptions.
48. As set out in our response to Question 9, it would be helpful to have some flexibility, where there are minor changes to the commercial fact pattern. For example, the applicant could have the ability to give an update to HMRC to obtain confirmation that the clearance can continue to be relied upon.
49. This updating process could be extended to cover any changes to the fact pattern/key assumptions after the clearance has been issued, rather than having a formal renewals process at a fixed point in time. It could cause uncertainty if businesses thought that HMRC might use a formal renewals process to change the view it had set out in the original clearance, even though nothing substantive had changed.



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