



Notification of uncertain tax treatment by large businesses – second consultation

Response from ICAS

1 June 2021

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 – second consultation, issued by HMRC on 23 March 2021.
4. We welcome the deferral of the implementation of the proposed notification requirement and the second consultation on revised proposals.
5. Action to tackle the legal interpretation portion of the tax gap should be properly targeted. The revised proposals fail to address the fundamental flaw in the original proposals, that they were not well-targeted. The Government and HMRC appear to be seeking to address a problem related to a minority of uncooperative large businesses - as illustrated by the predicted yield, which is very small compared to the legal interpretation part of the tax gap or to the size of the large businesses currently in scope.
6. The requirement should only apply to the minority of uncooperative large businesses – not to the entire large business population. The compliant majority want to work constructively in real time with HMRC but are experiencing increasing difficulties in doing so due to CCM resource constraints. We expect that the proposed requirement will generate unnecessary (and in some cases duplicate) disclosures which will waste time and resources for compliant businesses and HMRC, and increase pressure on both.
7. The impact assessment notes that HMRC will require additional resources to consider the notifications and caseworkers to enquire into them. It would be far more constructive, and more likely to achieve the stated objectives, if additional resources were directed to the existing CCM and BRR+ regime instead. The majority of large businesses would then be able to engage with HMRC in real time, reliably and consistently, with a greater likelihood of resolving uncertainties quickly – and HMRC could also increase its engagement and compliance activities with currently uncooperative large businesses.
8. The suggested 'exemption' where matters are discussed with a CCM is inadequate to remove the compliance burden which will be placed on cooperative large businesses. The position will be even worse for businesses within scope which do not have a CCM; the proposed alternative lacks any detail but would inevitably leave them at a disadvantage. Any business brought within the proposed notification requirement should also be given a CCM and brought within the BRR+ process.
9. The scope of the proposed requirement also remains too wide. The examples of regimes in other jurisdictions mentioned in the consultation, particularly the Australian requirement, only apply to corporation tax. The exclusion of VAT from the UK requirement would reduce some of the problems identified with the UK proposals.
10. If the measure is not amended so that it only applies to uncooperative businesses, some of the triggers will need to be clarified and made more objective. We have particular concerns about HMRC's 'known' position (which affects three triggers), trigger (d) (which is a major issue for VAT) and trigger (g).

Specific questions

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

11. Action to close the legal interpretation portion of the tax gap should be properly targeted. The proposed requirement should only apply to uncooperative large businesses not the entire large business population.

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

12. The measure should be properly and narrowly targeted at the minority of large businesses which are not prepared to engage constructively with HMRC in real time – the majority of compliant large businesses should be excluded altogether.

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

13. We welcome the commitment in paragraph 2.30 of the consultation to explore this option further. The main objection raised to using the BRR+ process and risk rating to exclude low risk businesses is that it is non-statutory.
14. Legislation already exists in Finance Act 2016, schedule 19, part 3 which imposes sanctions on uncooperative large businesses. We suggest that the notification requirement could be added to these sanctions. This would ensure that the requirement only affected uncooperative businesses; low risk businesses would not need to devote time and resources to considering it.

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

15. It would be preferable to exclude all low risk businesses from the proposed notification requirement, so that they do not need to devote any effort to considering exemptions – see our response to question 3. If that is not possible, various problems with the main proposed exemption need to be addressed. In particular, adequate CCM resources need to be provided.
16. Paragraph 2.7 of the consultation notes that businesses *'that are open and compliant in their relationship with HMRC should not have significant additional compliance costs. If such businesses are already discussing uncertainties with HMRC, they will not be required to notify again under this regime'*. Paragraph 2.26 adds that *'many large businesses already have discussions with HMRC regarding areas of uncertainty. If HMRC is already aware of the uncertainty, and how the business plans to treat it for tax purposes, the business will not be required to bring it to HMRC's attention again through the notification process, unless the business treats the transaction contrary to HMRC's recommendation.'*
17. It is not clear how HMRC envisages this exemption will work in practice. We are receiving increasing amounts of feedback that businesses want to engage with HMRC in real time to discuss and address areas of uncertainty but are finding this is becoming more difficult and is sometimes impossible, due to constraints on CCM resources. In some cases it is also proving difficult for CCMs to find the right HMRC expertise to deal with an issue raised by a business, in a reasonable timeframe. Companies could find themselves disclosing (and trying to discuss) uncertainties but being unable to engage with HMRC or obtain a 'recommendation' before the notification deadline – and therefore having to disclose again through notification.
18. Paragraph 2.27 of the consultation comments that HMRC will expect the same level of detail in the discussions with HMRC about areas of uncertainty, as will be required if a notification is made. However, there is no explanation of how businesses will be able to demonstrate that they have already discussed uncertainties in sufficient detail with HMRC – particularly if the discussions have taken place by telephone or in meetings. The first consultation referred to 'formal discussion' and agreement in writing from HMRC that it has sufficient information to mean a notification is not

required. These suggestions have disappeared from the second consultation, but the underlying issue has not been addressed.

19. Businesses are likely to press CCMs to produce agreed written notes of telephone conversations and meetings – and we understand that there can already be a significant time lag on HMRC's side. This will put additional pressure on resources, particularly where compliant businesses take a prudent approach in deciding what is uncertain and needs to be discussed - and if such businesses also end up duplicating disclosures through formal notifications where resolution has not been reached.
20. We have also been told by our members that there are now delays reviewing risk ratings via the BRR+ process because HMRC does not have the resources to keep risk reviews up to date – risk reviews are due but are not being carried out. This is particularly significant for businesses which have been actively working towards achieving a 'low' rating but cannot get the right level of engagement from HMRC.
21. The notification requirement, as currently proposed, is likely to make matters worse by diverting resources into unproductive activities for both HMRC and compliant large businesses and potentially taking HMRC resources away from dealing with the small number of higher-risk entities which do not want to adopt collaborative working.
22. Whilst it is clear from the first consultation that anything disclosed under other legislative requirements, such as DOTAS, will not need to be notified, it remains unclear whether it will be sufficient to disclose information in a clearance application, a request for a ruling, a request for a new PESM or by other means (for example, discussions with HMRC about the VAT treatment of a new energy product or service). Not all of these disclosures will be made to the CCM. We assume that a separate notification would not be required in these examples (provided that, where relevant, transactions proceed in line with the clearance or HMRC's ruling is followed) but clarification would be useful. In the case of clearance applications, the clearance itself might only cover one aspect of the overall transaction – but HMRC would have all the details. If the business felt that there could be uncertainty around the other aspects, would a notification be required?
23. Paragraph 2.28 of the consultation comments that '*so that businesses without a CCM are not disadvantaged, HMRC will provide a method*' for the discussions referred to in paragraphs 2.7 and 2.26 to occur. Again, there is no detail on how this will work in practice, but it is difficult to see how such businesses will avoid being disadvantaged. When the CCM and BRR+ regime is properly resourced and working well, the business and CCM regularly work together and the CCM develops an understanding of the business, which will assist in holding the necessary discussions.
24. Any business brought within the proposed notification requirement should also be given a CCM and brought within the BRR+ process.

Question 5: Do you think that the triggers are sufficiently objective?

25. The triggers are an improvement on the previous proposals. However, there remain areas of subjectivity and considerable uncertainty and we expect that there will still be large numbers of notifications which err on the side of caution, or duplicate information already disclosed (as outlined in our response to question 4). It therefore remains unlikely that the proposals will help HMRC to achieve its intended objectives. Time and resources will be wasted sifting through notifications from businesses which already engage constructively with HMRC – rather than targeting efforts at the uncooperative minority.
26. We set out our concerns, and issues requiring clarification in our responses to questions 6, 7 and 10.

Question 6: Can you suggest ways to make them more objective and certain?

HMRC's known position

27. Triggers (a), (c) and (f) refer to HMRC's 'known' position; paragraph 3.30 of the consultation states that this would include something from guidance statements, court decisions or other material (of

HMRC or a Minister of the Crown) that is in the public domain. This is far too wide. We do not believe it is reasonable to expect businesses to be aware of and keep track of so much material, some of which may not be readily accessible or widely known about. Businesses should have clarity around exactly which material they would be expected to consult and monitor for updates.

28. HMRC's published guidance sometimes lags behind an HMRC change of opinion; there might be references to HMRC's new approach in the public domain, for example in the minutes of stakeholder forums on GOV.UK, but businesses should not be expected to be aware of this until official guidance is updated in an HMRC manual, VAT Notice or a Revenue and Customs Brief.
29. A business might consider that the tax treatment of a particular transaction is straightforward because it was unaware of a paragraph in some 'other material' which suggested otherwise. It might not even be aware that the 'other material' existed – for example, where the business was not a member of a particular stakeholder group.
30. The guidance and other material businesses are expected to consult should therefore be explicitly included on a list published by HMRC; it should also be formal, well known and readily accessible, for example, HMRC manuals, VAT Notices and Revenue and Customs Briefs. First tier tax tribunal decisions should be explicitly excluded - it is not clear whether 'court decisions' is intended to include them, but it would not be reasonable for businesses to be expected to track these, particularly as FTT decisions are not binding.
31. There will be areas where there is published official guidance in HMRC manuals but there is still considerable scope for uncertainty in deciding how that guidance applies to a given set of circumstances, for example, determining whether a permanent establishment exists. Large businesses will take advice and take a view – and will often want to discuss with their CCM – but inevitably this uncertainty will often prompt compliant businesses to decide that it would be prudent to make a notification where the issue remains unresolved by the notification deadline.
32. The second bullet of paragraph 3.30 of the consultation states that HMRC's known position would also include something from 'dealings in writing', with HMRC by or in respect of the company or partnership in question. This will need some modification where significant new legislation is introduced. There will also be issues around other material in the public domain, in the context of new legislation. There will often be a period when HMRC's official views on all aspects of the new regime will not be known or covered in official guidance (for example, an HMRC manual). However, there will be discussions with HMRC, some less formal material in the public domain and potentially some 'dealings in writing' between HMRC and a business in the period leading up to the introduction of the legislation and immediately afterwards. It may take some time for a settled HMRC view to emerge.
33. We understand from large businesses that in the case of both the Corporate Criminal Offence and the Diverted Profits tax, CCMs and other HMRC officials liaising with businesses and industry groups gave some information about how they would apply, ahead of implementation, which later turned out to be misleading or incorrect. We suggest that there should be no notification requirement linked to HMRC's 'known' view for, say, the first two years after introduction of new legislation.

Trigger (d)

34. Trigger (d) relates to novel products, transactions or business structures. This trigger is likely to be particularly significant for VAT. We understand that it is already difficult to obtain VAT rulings from HMRC in a reasonable timeframe and the notification requirement is likely to prompt additional requests for rulings. Unless more resources are made available to give rulings more quickly, there will be many notifications of novel products and services where the VAT treatment is unclear, and the business is uncertain whether HMRC has all the information it might want.
35. Paragraph 3.20 gives an example to illustrate trigger (d), involving a VAT group application. It is unclear why HMRC believe that this should fall within the notification requirement, given that an application to join the VAT group is made in this scenario. HMRC therefore has the opportunity to refuse the application or to seek more information to allow it to consider the application in more detail. The business may not consider that there is any uncertainty. We do not believe that

notification should be required in these circumstances as HMRC has ample opportunity to obtain any information it needs at a much earlier stage.

Trigger (g)

36. This trigger needs to be clarified because there is confusion within the consultation document itself. Trigger (g) as set out on page 14 of the consultation refers to professional advice which is *'contradictory, in terms of tax treatment, to other professional advice they have received'*. However, in the example given in paragraph 3.40 it is suggested that notification could be triggered under (g) where *'the treatment resulted from external advice (or following in-house analysis) where the advice indicated that there were several potential tax treatments available, and no treatment was certain.'* In the example, there appears to be uncertainty around the treatment – but not necessarily any contradictory advice as set out on page 14.

Question 7: Do you think any of the triggers will not capture the uncertain treatments they are intended to identify?

Trigger (g)

37. Trigger (g), as currently proposed, seems to suggest that where advice is taken only from law firms, rather than other advisers, notification under this trigger would not need to be made. We do not believe that this is the right approach. Whilst HMRC cannot see legal advice due to legal professional privilege, that should not remove the need for an uncertain position to be disclosed – the advice may be privileged but the outcome would not be (it would affect the tax return and potentially some accounting entries). It should therefore be possible to make a notification flagging that there is an uncertainty, without disclosing privileged advice.
38. Paragraph 5.2 of the consultation mentions the possibility of including details of external legal advisers in notifications; it is not clear whether the government intends to adopt this suggestion (which was apparently taken from responses to the first consultation) or what the purpose would be of requesting this information. We do not consider that a requirement to include this information would be appropriate. Most large businesses will use legal advisers, but it appears that some link is being suggested with trigger (g), rather than that all notifications should include details of legal advisers – although as currently proposed a notification would apparently not be required under (g) in cases where the only advice came from legal advisers. This should be clarified.

Other triggers

39. Apart from trigger (g), which appears to exclude some treatments which should be included, the other triggers are likely to capture far more treatments than intended, due to uncertainty around interpretation and compliant businesses adopting a cautious approach.

Question 8: Are there additional triggers that would identify uncertain tax treatments that would not be identified by these triggers?

40. Rather than creating additional triggers, the existing triggers should be improved, as set out in our responses to questions 6 and 7.

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

41. We do not have any detailed comments on this question. We consider that (e), (f) and (g) could potentially apply but not the other triggers.

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

42. The proposed threshold of £5m is an improvement on the original suggestion of £1m, but the absence of any consideration of materiality remains a significant problem. The first consultation specified that the threshold applied 'per financial year' and we assume that this remains the case.

43. The consultation document refers to notification requirements in other jurisdictions, including Australia. However, the Australian requirement differs from the proposed UK requirement because it only applies to corporation tax and includes a materiality threshold. Some of the problems relating to the threshold in the UK relate to VAT – as hinted at in paragraphs 3.39 and 3.40 of the consultation. If VAT continues to be within scope, more explanation and examples need to be provided around how the threshold and triggers should be applied. In particular, there needs to be clarification of:
- the approach to ‘netting off’ for VAT (the examples in paragraph 3.38 do not cover VAT);
 - the interpretation of paragraph 39 of the consultation, dealing with amalgamation of the same or similar products and transactions; and
 - the example in paragraph 3.40 of the consultation – this could be read as suggesting that amalgamation for VAT goes beyond one financial year and extends into future years, but we assume this is not the case.

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

44. As noted in our response to question 10 the consultation document refers to the notification requirement in Australia. However, this only applies to corporation tax and includes a materiality threshold. The Australian materiality threshold varies according to the level of the current tax expense. A similar approach could be adopted in the UK which might mitigate some of the concerns set out in paragraph 3.35 of the consultation.
45. One of the concerns relates to different treatment applying to different businesses, depending on size. However, trigger (e) already effectively brings in materiality – but is apparently considered to be acceptable.

Question 12: Do you agree with the proposed rules to calculate the threshold?

46. See our response to question 10. If VAT remains within scope, additional clarification and examples need to be provided, specifically relating to VAT.
47. It is also unclear how the threshold would apply where the uncertain tax treatment only results in a timing difference. This is relevant to VAT and direct tax, and also needs to be clarified.

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

48. See our responses to questions 10 and 12.

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

49. Yes, this is an improvement on the previous proposals.

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

50. Yes, this makes sense.

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?

51. Yes, this also makes sense.

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

52. From the VAT perspective it is not clear what is meant by the exclusion of ‘tax neutral intra-entity transactions’. This needs to be clarified before we can comment properly on the proposed exclusion.

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

53. See our response to question 7.

Question 19: Do you agree failure to notify regarding a partnership return should be charged on the nominated partner?

54. Yes.

Question 20: If the penalty is not on the nominated partner, on whom should the penalty be charged?

55. We have no comments on this question.

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

56. The exchequer impact has been adjusted slightly to show even lower exchequer receipts than the assessment in the first consultation, with an unexplained spike in 23/24. The predicted yield from the measure is very small compared to the legal interpretation part of the tax gap or to the size of the large businesses currently in scope, reinforcing our view that the notification requirement should be targeted at the uncooperative minority of high risk large businesses, rather than imposed on the entire large business population.
57. The assessment of the impact on HMRC notes that HMRC will require some additional resources to consider the notifications and caseworkers to enquire into them. We believe that it would be far more constructive and more likely to achieve the stated objectives if the additional resources were directed to the existing CCM and BRR+ regime. The majority of large businesses would then be able to engage with HMRC in real time, reliably and consistently, with a greater likelihood of resolving uncertainties quickly – and HMRC could also increase its engagement and compliance activities with currently uncooperative large businesses.

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