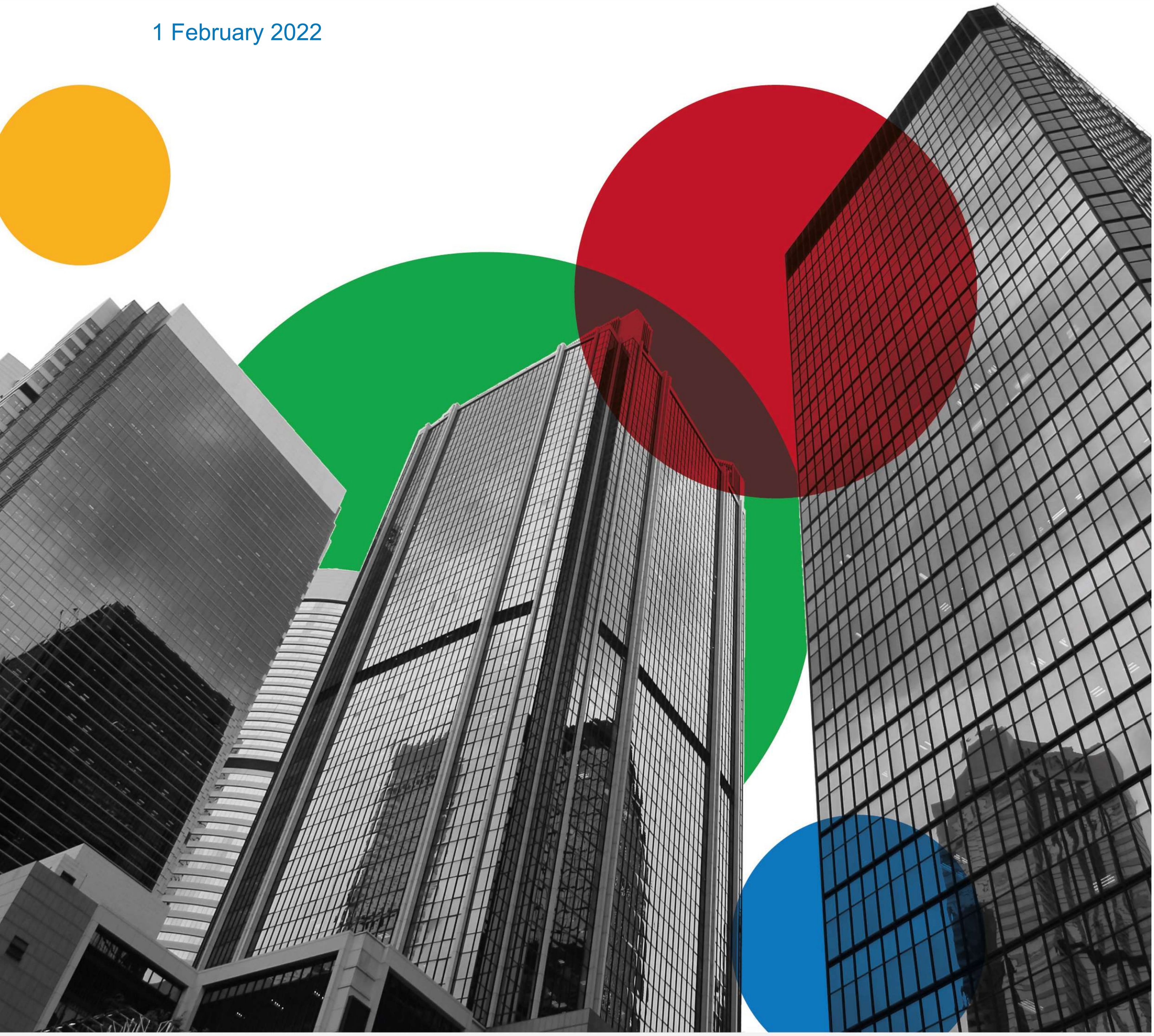
Technical consultation: Uncertain Tax Treatment (guidance)

Response from ICAS

1 February 2022



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.

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. ICAS welcomes the opportunity to comment on the updated draft guidance on the notification of uncertain tax treatment (UTT) published by HMRC on 18 January 2022. We also appreciated the opportunity to discuss broader issues relating to implementation of the notification requirement at a meeting with HMRC in December.

5. We are pleased that the introduction of the proposed third trigger ('substantial possibility') has been delayed. If this trigger is reintroduced at a later date, it is important that it should be more objective, targeted and workable. We look forward to further discussions about any revised proposals.

6. It is helpful that the guidance on the second trigger (HMRC's known position) has been improved in some respects. However, the guidance and legislation still fall short of providing certainty and a level playing field for all businesses seeking to ascertain HMRC's known position. The listing of the guidance and other material businesses are expected to consult has been expanded but still needs to be more explicit and should also be exhaustive.

7. We are concerned to see the comments in UTT15400 about the interaction between UTT notifications and Business Risk Reviews. In principle, making notifications should not have an adverse impact on risk ratings. The stated purpose behind UTT is to encourage businesses to engage with HMRC early and in real-time as far as possible to obtain exemption from notification. However, feedback we consistently receive from large businesses is that they want to engage with HMRC in real time to discuss uncertainties (or obtain clearances) but can find this difficult due to HMRC CCM and specialist resource constraints. If large businesses feel that they have been unable to confirm that the exemption applies, and therefore notify, it would be inappropriate for this to adversely affect their risk rating.

8. We remain concerned that available HMRC resources will not be able to deal with the additional work generated by the UTT requirement, adding to the administrative burdens for large businesses which want to comply. We understand that HMRC will be giving guidance to its CCMs and specialists about the exemption – and the need to ensure that large businesses know that they have provided sufficient information to qualify. Making this process work will be essential, but it is currently difficult to understand how HMRC intends to address the apparent underlying shortage of resources. Most large businesses will not want to end up in discussions with HMRC about possible penalties for failing to notify – if they cannot resolve an uncertainty or obtain written confirmation that sufficient information has been provided to HMRC in order to qualify for the general exemption, the default position will usually be to make a notification.

9. There are likely to be some practical difficulties in operating the regime initially. It would be helpful for HMRC to commit to a review of how the processes are working and of the guidance, after, say, two years. The guidance could then be updated and amended to try to address any common problems arising in practice.

Comments on specific issues

Scope

10. It would be useful to improve the cross referencing between UTT12300 and UTT12100. UTT12300 currently includes the following comment: “Refer to UTT12100 to quantify the turnover and balance sheet threshold when non-UK resident partnerships and non-UK resident companies are involved.” It would be helpful if there was also a cross reference back to UTT12100 to cover the position where a company joins or leaves a group part way through its financial year. It would also be useful to add an example, probably to UTT12100, to illustrate this scenario.

Trigger 1 – provisions

11. We welcome the extended notification deadline for non-annual returns, which was introduced by an amendment to the Finance Bill. The extended deadline is discussed in UTT15200 in the guidance – see our detailed comments on this below. As a general point, it would be helpful for all examples in the guidance to state clearly which trigger is involved – and where relevant, take account of the extended deadline for non-annual returns.

12. Paragraph 10(2) of the legislation applies where a provision has been recognised in the accounts of the company or partnership to reflect the probability that a different tax treatment will be applied to a transaction to which the amount relates.

13. UTT13100 states that ‘The criterion applies irrespective of where the provision is presented in the accounts.’ It would be useful to have some clarification of how this is to be interpreted where the ‘provision’ does not have an impact on either the P&L or the balance sheet. For example, an entity which does not recognise deferred tax, has tax losses. An uncertain tax treatment would reduce the tax losses carried forward if the company’s view of the tax treatment turned out not to be correct. IAS 37 notes that ‘An entity recognises a provision if it is probable that an outflow of cash or other economic resources will be required to settle the provision.’ In this example, the uncertain tax treatment would not affect the balance sheet or the P&L because no value is being placed on the losses, so the only reference to the uncertain tax treatment would be in the Notes to the Accounts. Is it the intention that this should be notified? The position is not clear from the legislation or the guidance.

14. Provisions are often recognised at group level, particularly if more than one group company may experience uncertainty in respect of the tax treatment of the same issue. It is unclear how paragraph 10(2) should be interpreted in these circumstances. Ideally, the position should be clear from the legislation, but we assume that the intention is that a provision made in a group’s consolidated accounts rather than the individual accounts of the qualifying company, should trigger a notification. This is particularly relevant to VAT, where the VAT group representative member is filing for the group as a whole. It would be helpful if UTT13100 clarified the position – and included an example illustrating the point. It might also be useful to add something to Example 2 in UTT15100 to cover the issue.

Trigger 2 – HMRC’s known position

15. We welcome the changes to the table of publications in UTT13200. It is helpful that the table has been expanded and that explanatory and technical notes relating to legislation are now in the left-hand column rather than the right.

16. However, the guidance and legislation still fall short of providing certainty and a level playing field for all large businesses seeking to ascertain HMRC’s known position. In relation to guidance and other material in the public domain, the listing (of items containing HMRC’s known position) still needs to be more explicit and should also be exhaustive. The reference to ‘types of publications’ in the introduction to the table lacks clarity. If businesses cannot be sure which published material they are expected to consult and monitor for changes, it will generate uncertainty and additional notifications or approaches to HMRC for clarification.

17. Whilst it is helpful that a link has been provided to HMRC’s technical manuals, this is not sufficient. There should be more signposting to the material in the left-hand column – preferably via a

‘landing page’ with links to as much as possible of the published material. We appreciate that whilst it would be simple to add a link to the Revenue & Customs Briefs, some of the other material would be more difficult but further consideration should be given to how signposting and links could be improved to increase certainty.

18. We have the following comments on other items in the table:

- Guidelines for Compliance: it is not clear what this refers to. There needs to be additional explanation and preferably signposting and links to the relevant material.

- Advice provided via HMRC forums: this has been added to the right-hand column. We assume this may be intended to cover an issue we raised previously, i.e. whether businesses would be expected to consult the minutes of HMRC stakeholder groups published on GOV.UK. If so, the description should be amended to make this clear. ‘Advice’ is probably not the right word to cover discussions at a meeting, and ‘forums’ is a very general term which could, for example, cover HMRC’s online agent and customer forums (we assume this is not the intention). As far as the minutes of stakeholder groups are concerned, the inclusion of this item in the right-hand column does at least provide clarity (subject to the description being improved). However, given that in practice, HMRC does sometimes indicate a change of approach or comments on its view of an issue at stakeholder group meetings, it gives rise to practical concerns for businesses which are aware of these discussions. In some cases the issue could be addressed by HMRC ensuring that it rapidly updates its formal guidance or issues a Revenue & Customs brief to clarify the position.

- The table makes no specific reference to industry practice. The second consultation noted that *‘(m)any industries have an established industry-wide approach to treating certain transactions. This is often published in HMRC manuals or guidance provided by trade representative bodies*.’ Where material is included in HMRC technical manuals the position is clear and covered by the entry in the left-hand column of the table. We assume from the table that HMRC do not intend material published by an industry body or covered in discussions at an industry forum to be treated as reflecting HMRC’s known position. Feedback from members working in industries with well-established industry guidance and HMRC liaison groups indicates that this will be problematic and likely to lead to notifications (or requests for clarification that the general exemption will apply) where the business knows that the approach adopted reflects HMRC’s views because of industry guidance or discussions.

19. We note the comments in the introduction to the first set of examples in UTT13200, that the examples are purely illustrative and do not set out HMRC’s current known position. However, it is unhelpful that Example 1 (VAT and energy saving materials) does not give any indication of where HMRC’s view can be found – instead simply asserting that the company’s approach is ‘contrary to HMRC’s view’. This contrasts with Examples 2 and 3 which set out clearly the sections of HMRC’s published guidance which provide evidence of HMRC’s known position.

20. Example 3 in the first set of examples in UTT13200 (substantial shareholdings exemption) is also unhelpful and requires clarification. In this scenario the uncertainty seems to relate largely to the application of the relevant HMRC guidance to the facts. HMRC’s guidance on SSE in CG53116, requires the taxpayer to consider its activities in the round – and states that the indicators listed should not be regarded as individual definitive tests to which a 20% ‘limit’ applies. 20% is a helpful rule of thumb for ease of application but it is the nature of the trade and the factual details of the taxpayer’s activities which matter. This is slightly obscured in the Alpha example, by the suggestion that more than 50% might be used as the measure – which seems unlikely. The final sentence of CG53116 specifically notes that if HMRC and the company cannot agree then the status of a company could only be established as a question of fact before the First-tier Tribunal. This appears to be a case where there might not be a clearly expressed ‘known position’, as described in the later paragraph of the guidance headed ‘Factual Uncertainties’.

21. Clearances: UTT13200 sets out HMRC’s view of the three possible outcomes of a clearance application. It explains that the first and third bullets express a known position by HMRC to the company with is the subject of the clearance. The second bullet covers a long list of different

factors which might lead to HMRC declining to provide clearance; it would be helpful for the guidance to give some indication as to what the taxpayer should conclude about HMRC's 'known position' for some of these scenarios. For example, if HMRC does not think there are points of uncertainty – but the taxpayer does – should the taxpayer assume that its interpretation, as set out in the clearance application does reflect HMRC's view? To some extent this may be less of an issue for the UTT guidance but may need to be reflected in improved explanations provided by HMRC when refusing clearance requests.

22. Outdated or contradictory HMRC publications: Regardless of the UTT requirement, ICAS believes that HMRC should improve its updating of publications to minimise the occasions when manuals or other official guidance are out of date or contradict each other. We are aware that work to improve guidance is ongoing within HMRC, but it is important that having achieved improvements, these are maintained and that future changes are swiftly reflected in updated guidance.

23. UTT13200 notes that 'Any significant changes are initially highlighted by published briefs from HMRC. Guidance manuals are then updated.' We recognise that this often occurs in the context of VAT, where a Revenue & Customs Brief is issued before the manuals are updated. It is less clear whether HMRC has other specific 'briefs' in mind for the other taxes within the scope of UTT – it would be useful to clarify this and explain where businesses can expect to find information about changes to other taxes before it is included in the guidance manuals.

24. UTT13200 goes on to say that where guidance is contradictory, the known position is to be taken as the most recently published statement of the known position. This is more helpful than the wording in the previous draft guidance. However, in practice, whilst it may be obvious in some cases which piece of guidance is the most recent, this may not always be the case, particularly where there are issues with the recording of updates on GOV.UK. Wherever possible HMRC should seek to ensure that the situation where guidance is contradictory does not arise.

25. Example 3 in the second set of examples in UTT13200 (illustrating contradictory guidance) covers an example involving an Upper Tier Tribunal decision. It is useful that HMRC has included 'submissions HMRC makes in litigation' in the right-hand column of the table but example 3 raises some issues around this. The example makes clear that the taxpayer should still notify if they adopt a treatment based on a UTT decision if it is contrary to HMRC's position set out in published guidance (until/unless HMRC amends its published guidance to reflect the decision). We assume that a similar approach would apply to decisions of higher courts, other than presumably the Supreme Court. However, it is not clear what HMRC would expect taxpayers to do if HMRC win a case – but on a different basis from that set out in their public guidance.

26. We welcome HMRC's comments, at the end of UTT13200, that it recognises that there is a large volume of published material and the UTT regime is not intended to act as a series of tripwires leading to penalties, where a business took a reasonable approach to establishing HMRC's position. However, most large businesses will not want to end up in discussions with HMRC about possible penalties for failing to notify. Whilst the guidance on HMRC's known position has been improved, it still leaves too much uncertainty which we would like to see addressed – to minimise the number of notifications to HMRC (or approaches to HMRC for clarification/confirmation of exemption from notification).

Tax Advantage

27. We note the comment at the beginning of UTT14200 that the examples in the section are only relevant to the amount of the tax advantage and do not have any indicative value in relation to the interpretation of whether any of the notification criteria are met. It would nonetheless be more helpful if the examples indicated the triggers involved and illustrated them in a way which was consistent with the rest of the guidance. Examples which do not work for all aspects of the regime do not help businesses to interpret the requirements.

28. In CT examples 1 and 2, it would be useful to set out where HMRC's known position can be found. In example 2, more information on the nature of the uncertainty and why the amount of interest income is not treated correctly by Beta Ltd would make the example more useful.

29. VAT example 1: given the factual prescriptiveness of the guidance in VAT Notice 714 around whether clothing is designed for young children, uncertainty is more likely to arise from whether the item is suitable for young children – it might be preferable to use this in the example.

30. The commentary about partially exempt businesses in UTT14200 makes clear that a partially exempt business will file returns that calculate recoverable input tax on a provisional basis, pending their longer period adjustment - but the meaning of the rest of the paragraph and the implications for notification are unclear. An example illustrating what HMRC mean in practice should be added to the section.

The expected amount

31. There are two references in UTT14300 to there being more than one 'known position' – in which case the expected amount is the amount that produces the lowest tax advantage. It is not clear how these comments can be reconciled with the statements in UTT13200 (under the heading 'Outdated or contradictory HMRC publications') that in cases where HMRC's position is unclear there will be no 'known position', and where HMRC's position is contradictory, the 'known position' is to be taken as the most recently published statement of the 'known position'.

32. Examples illustrating cases where there could be two 'known positions' should be added to illustrate what HMRC has in mind. Would one possibility be where there is one 'known position' from guidance and another from 'dealings' with the company – although in this case it seems likely that HMRC's position might be unclear so there would be no 'known position'?

Relevant period

33. As noted in paragraph 30 above and paragraphs 35 and 38 below, it is difficult to reconcile some of the VAT examples with some of the comments in different sections of the guidance. In UTT14400 we assume that VAT examples 1 and 2 relate to companies which are not partially exempt; it would be helpful if the examples stated that this is the case. However, there is some further commentary on example 2 in the section of UTT14400 headed 'Partial exemption' – it might be preferable for this to be a separate example to avoid confusion. It would also be useful for this example involving partial exemption, to include the notification deadlines.

Notification requirements and deadlines

34. As noted in our comments on Trigger 1 above, it would be helpful for all examples in the guidance to state clearly which trigger is involved – and where relevant, take account of the extended deadline for non-annual returns.

35. Currently, some of the examples in UTT15100 and UTT15200 could be misleading where they relate to VAT and PAYE. It is also difficult to reconcile some of the VAT examples with the comments and examples in UTT14400 relating to calculation of the VAT threshold and to partial exemption.

36. For PAYE, the legislation defines the returns within scope as returns 'under PAYE regulations'. There is no discussion of this within UTT12000 and the examples in the guidance refer either to 'PAYE returns' or FPS. It would be useful to include some examples covering other common returns within scope, for example P11Ds and share scheme returns, particularly in the context of deadlines for reporting and which PAYE return would constitute the final return of the year.

37. The examples in UTT15200 relating to VAT and PAYE need clarification/amendment. In example 2 (Kamfite Ltd), the notification is triggered by the inclusion of a provision in the accounts. However, the notification deadline suggested by the example is 25 November 2022. As the accounts for Kamfite are made up to 30 November, no provision would have been made in the accounts at 25 November 2022 – it appears that the extended deadline for non-annual returns should be applied and reflected in the deadline for notification.

38. In example 3 (non-annual VAT return – healthcare services), it seems possible that the trader would be partially exempt, in which case the final VAT return of the year would not be the return

ending 31 December 2022 – the annual partial exemption adjustment would be dealt with in the first VAT return after the year end. This example also does not state which trigger is involved – this should be specified to make clear whether the extended deadline would be applicable.

Interaction of notification with Business Risk Reviews and Senior Accounting Officer certificates

39. We are concerned to see the comments in UTT15400 about the interaction between UTT notifications and Business Risk Reviews. In principle, making notifications should not have an adverse impact on risk ratings. UTT11000 states that HMRC's aim for UTT is to 'encourage businesses to engage early and in real-time as far as possible to obtain exemption [from notification]'. It is helpful that UTT16200 states that HMRC will confirm when the general exemption is met – this is vital if HMRC wants to minimise the number of notifications.

40. However, feedback we receive from large businesses is that they want to engage with HMRC in real time to discuss uncertainties (or obtain clearances) but can find this difficult due to HMRC CCM and specialist resource constraints. We understand that these difficulties have broadly been increasing in recent years. If large businesses feel that they have been unable to confirm that the exemption applies, and therefore notify, it would be inappropriate for this to adversely affect their risk rating.

41. The explanation of HMRC's view of the interaction between notifications under UTT and the SAO regime is helpful.

The general exemption

42. We welcome the explicit commitment in UTT16200 that HMRC will confirm when the general exemption has been met, where a business (or its agent) approaches HMRC, via the CCM or the MSB Customer Support Team to provide information and discuss an uncertain tax issue. We understand that HMRC will be giving guidance to its CCMs and specialists about the exemption – and the need to ensure that large businesses know that they have provided sufficient information to qualify. Making this process work will be essential, but it is currently difficult to understand how HMRC intends to address the apparent underlying shortage of resources. It remains unclear exactly how the discussions will be documented and whether HMRC will be able to provide the documentation and confirmation in a reasonable timeframe.

43. Most large businesses will not want to end up in discussions with HMRC about possible penalties for failing to notify – if they cannot resolve an uncertainty or obtain written confirmation that sufficient information has been provided to HMRC in order to qualify for the general exemption, the default position will usually be to make a notification.

44. It seems inevitable that demand for clearances and discussions around uncertainties will increase considerably as large businesses which want to comply seek to ensure that they have made adequate disclosures to qualify for the general exemption. Will HMRC be setting out timeframes within which it will provide documentation and confirmations? It is clear from the section of UTT16200 dealing with uncertainties discussed with HMRC before the introduction of UTT, that the business is expected to produce and hold a record of the interaction (which it could share with HMRC). We assume that a similar approach will be adopted for discussions post-introduction – presumably with HMRC confirming its agreement to the record produced by the business, so the business can be certain that the general exemption applies.

45. In the guidance on the general exemption, there is no reference to the position where the company has provided information to HMRC as part of the partial exemption special method (PESM) process. This involves providing detailed information 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. It can take a long time to reach agreement; in the meantime, there would be some uncertainty. It would seem to be unhelpful for HMRC to 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 – will confirmation that the general exemption applies be available in these cases?

46. As noted above, UTT11000 states that HMRC's aim for UTT is to 'encourage businesses to engage early and in real-time as far as possible to obtain exemption [from notification]'. This aim can only be achieved, with formal notifications being kept to a minimum, if businesses can obtain confirmation and certainty in time to prevent any risk of a possible penalty arising for a failure to notify. Otherwise open and transparent businesses are likely to decide that they have no option but to make formal notifications.

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