Notification of uncertain tax treatment by large businesses

Large Corporate

29 October 2020

The CIOT expressed strong opposition to the proposal to require large businesses to notify HMRC if they adopt an uncertain tax treatment on the basis that the proposal is unclear, unfair and will lead to onerous demands on affected businesses.

At the Spring Budget 2020, with details in a subsequently published consultation document, the government announced proposals for large businesses to notify HMRC where they have adopted an uncertain tax treatment. (It is suggested that this is where the business believes that HMRC may not agree with its interpretation of the legislation, case law or guidance.) HMRC claim this requirement will help to reduce the legal interpretation tax gap (broadly, this is the tax not collected as a result of businesses adopting tax treatments that HMRC does not agree with).

The CIOT had a discussion with HMRC about this proposal during the summer and submitted a written response to the consultation. We said that we are strongly opposed to the introduction of this compliance obligation and we encouraged the government to rethink. Our response explained why this proposed compliance obligation is inherently unclear and unfair. In our view, businesses would not be able to comply with it with any confidence or certainty that they have got it right. We said that it is unreasonable to expect taxpayers to form a judgement on what HMRC may or may not do.

We noted that, given the many challenges businesses are facing because of COVID-19, now is not the time to add to compliance burdens unless the measure is better justified. Also, we noted that it is not encouraging for the cooperative relationships that HMRC is keen to foster with businesses if, even when a business embraces collaborative and cooperative compliance, the government still imposes new rules which significantly increase the compliance burden upon that business.

Our response said that it is not clear how a requirement to notify will assist HMRC in achieving the stated policy aim of closing the legal interpretation tax gap, even if a satisfactory objective definition of uncertain tax treatment (and therefore what must be notified) is found. We said that time should be taken to evaluate which issues contribute to the legal interpretation tax gap that are not already disclosed to HMRC through the existing compliance systems.

We said that the fundamental building block of the proposal – that is, what constitutes an 'uncertain tax treatment' that must be notified – is inherently uncertain and unclear. This is with regard to both the wholly subjective test devised around the likelihood of an HMRC challenge; and the principal exclusion proposed, which is intended to ensure that HMRC are not told about 'what they already know'. Our response also explained how the lack of coherency around how this proposal interacts with the existing tax system amplifies the flaws in the proposal.

As it is currently framed, the requirement to notify uncertain tax treatments would place large businesses under an obligation with which they would be unable to comply with any confidence or certainty, resulting in an unreasonable, increased compliance burden on compliant taxpayers and a greatly increased administrative burden for HMRC for little benefit to the Exchequer.

It is our view that the proposal is not a fair balance between the powers of tax collectors and the rights of taxpayers. It is unfair to have a compliance obligation based on a test which is as subjective and uncertain as that currently proposed linked to penalties. Penalties should be reserved for deliberate or careless behaviour and not applied where a compliance failure arises as a result of uncertainty or a judgement call around reporting obligations. In particular, we noted the risk of an inequitable penalty in circumstances where courts ultimately determine that there is no additional tax due. As a result of the way the proposal was presented in the consultation document, even if a business has a reasonable tax position, and has taken care to consider whether or not the tax position is correct and certain, HMRC can disagree, open an enquiry and levy a penalty for not notifying the tax treatment. Even if the taxpayer goes to court and eventually wins, such that the tax position is ultimately held as correct, there is the jeopardy of a penalty. During CIOT's discussions with HMRC, HMRC indicated that they would consider amending the proposal so that a penalty would not be due if the outcome of the enquiry/dispute was that there was no further tax due and we encourage them to do so.

The consultation document also said that the requirement should cover notifications in respect of corporation tax, income tax (including PAYE), VAT, excise and customs duties, insurance premium tax, stamp duty land tax, stamp duty reserve tax, bank levy and petroleum revenue tax. We suggested limiting the proposal to corporation tax, at least initially. We understand that HMRC are sympathetic to the idea of reducing the taxes to which the obligation would apply but may wish to also include VAT and PAYE. There also need to be additional exemptions to the requirement to notify in order to better focus the compliance obligation and a strong reasonable excuse defence.

Our full response can be read at: www.tax.org.uk/ref663.