Finance Bill 2021/22 draft legislation: notification of uncertain tax treatment

Large Corporate

04 November 2021

The proposal for a requirement that large businesses notify HMRC about ‘uncertain tax treatments’ will be legislated for in Finance Bill 2021/ 22 and will apply in respect of returns that are required to be made after 1 April 2022. We remain of the view that while the compliance measure has been greatly improved by the consultations on it, similar effects could have been achieved without legislation, within the existing tax administration framework. We are not convinced that the measure will achieve the stated policy aims effectively or proportionately.

The proposal for a requirement that large businesses notify HMRC about ‘uncertain tax treatments’ was announced at the Budget 2020. Following two consultations, in July 2021 the government published draft legislation for the new compliance obligation. This draft legislation will be included in Finance

Bill 2021/ 22, with the obligation to notify applying in respect of returns that are required to be made after 1 April 2022.

In August 2021, HMRC also published draft guidance for this measure. The CIOT responded in detail to both consultations (First consultation response August 2020: www.tax.org.uk/ref663; second consultation response June 2021: www.tax.org.uk/ref782); and this summer we have also commented on the draft guidance and draft legislation (www.tax.org.uk/ref829).

The draft legislation published in the summer shows that the government has continued to listen to stakeholders following the second consultation and sought to address some of the key concerns raised. However, while the consultation process has fashioned this compliance obligation into something that is largely workable, our

response reiterated our view that similar effects could have been achieved without legislation, within the existing tax administration framework. We said that it is a shame that this measure was announced in 2020 having already been decided upon in principle, and that consultation only started at ‘Stage 2’. Had there been a ‘Stage 1’ consultation about how to tackle the problems identified – the non-compliant minority of large businesses and the legal interpretation tax gap – we do not think that we would have ended up here. We said that we remain unconvinced that it will achieve the stated policy aims effectively or proportionately; and that the measure now being introduced will not be easy to comply with and will result in a great deal of uncertainty for taxpayers.

What is an uncertain tax treatment?

The original proposal set out in the first consultation document contained a very unsatisfactory definition of uncertain tax treatment that was inherently uncertain and unclear. This was refined into seven ‘triggers’ in the second consultation document. Following the second consultation, the draft legislation reduces the number of triggers in the definition of what is an uncertain tax treatment from seven to three. While we welcome this development, the triggers in the draft legislation are not without their difficulties. The third trigger (or notification criterion) around what a tribunal or court might find to be incorrect is inherently uncertain and lacking in precision.

Our comments on the draft legislation said that the third ‘trigger’ is loosely drafted and poorly conceptualised. Its inevitably uncertain application undermines any potential efficacy of this measure. Our view is that this test will likely be applied by large businesses that wish to be compliant at
a much lower bar than we understand HMRC envisage or are seeking notification of. Indeed, we understand that several large businesses, which are open and transparent in their dealings with HMRC, will deal with this new compliance measure by notifying to HMRC all tax risks identified by the business, regardless of the magnitude of the risk. This is because they wish to ensure that they avoid the potential reputational harm from any suggestion that they have failed to comply with this measure, however inadvertently. We noted that this high level of notifications may be a satisfactory result for HMRC, although it could be challenging from a resource perspective, but it does not mean that it is good law. In addition, although the largest businesses may have sufficient resources to comply with this measure in this way, it not an efficient use of them.

This measure is also intended to encourage businesses that do not currently act in a compliant and co-operative basis with HMRC to provide HMRC with additional information and easier identification of uncertainties, and sooner than would otherwise be the case. However, we are not convinced that this measure will achieve this, or change the fundamental behaviour of those that do not wish to act in this way. Our response said that it seems to us that the test within the draft legislation is sufficiently imprecise and uncertain to allow a large business that does not wish to be transparent to arrive at an arguable position that the test is not met in respect of its particular tax treatment. Thus, we commented that HMRC may receive more notifications from large businesses that are already open and transparent in their dealings with HMRC, than from those businesses that are less willing to have a cooperative relationship with HMRC.

Compliance burden

In our view, this measure will result in a substantially increased compliance burden for all large businesses, notwithstanding the general exemption, which is intended to ensure that open and transparent businesses that are already discussing what may now be considered uncertain tax treatments with their Customer Compliance Manager (CCM) will not have significant amounts of additional work.

Our responses also highlighted our concerns about the parity of treatment between businesses that have a CCM and those that do not. This discrepancy has been recognised throughout the consultation process, in particular in relation to the general exemption, which will apply in circumstances where a business has already told HMRC about the tax treatment. This exemption is based around the discussions that open and transparent businesses routinely have under the existing tax administration framework with their CCM, but HMRC has not yet provided any detail as to how this general exemption will be available to businesses without a CCM. The government's policy paper published in July 2021 alongside the draft legislation (July 2021 policy paper) said that for taxpayers without a CCM HMRC will utilise their existing Customer Engagement Team to provide an opportunity to discuss tax uncertainties.

The draft guidance published in August does not provide any detail around the 'structured opportunity' that might be provided by the Customer Engagement Team to replicate the experience of having a CCM for those large businesses that do not have one and avail themselves of the general exemption. We said that it is difficult

to see how the current Customer Engagement Team system could replicate having a CCM. We said that the guidance should be expanded to explain how the existing Customer Engagement Team will be available to large businesses without a CCM, and we understand that HMRC are looking at this.

HMRC guidance

The July 2021 policy paper also recognises the increased importance of guidance because of this measure, particularly considering the notification criterion around HMRC's 'known position'. We welcomed the commitment in that paper that HMRC will look for opportunities to improve their technical guidance. We agree that it is incumbent on HMRC to ensure their guidance is as up to date as possible.

To this end, we also welcome the working group that HMRC have established to consider areas of HMRC guidance that would benefit from improvement, specifically in light of the introduction of this measure in April 2022, and we are pleased to be part of this working group. This working group has been set up to carry out a programme of material improvements before the implementation of the uncertain tax treatment measure in April 2022.