Finance (No.2) Bill 2021-22
Clause 94 and Sch 15: Notification of uncertain tax treatments by large businesses

BRIEFING FOR MPS ON THE FINANCE BILL BY ICAEW TAX FACULTY

WHO WE ARE

Please see Appendix 1.

EXECUTIVE SUMMARY

1. We welcome the simplification of the Notification of Uncertain Tax Treatments provisions set out in schedule 15 of Finance (No.2) Bill 2021-22, in particular the removal of the "substantial possibilities" criterion which would have been very difficult to apply in practice. However, there remain a number of major uncertainties, which would ideally be resolved through legislative amendment to provide clarity over the effect of the provisions.

2. These uncertainties are as follows:

    a. Whether notification under this regime constitutes a disclosure that would prevent a discovery assessment being raised by HMRC in respect of the business' relevant tax return(s).

    b. Quantification of the "tax uncertainty" existing where the tax advantage consists of a deferral of tax or acceleration of input VAT.

    c. Whether a notification is necessary every time there is an intra-group transaction with a range of potential prices wide enough to meet the notification threshold.

3. If the measure is to be effective for PAYE and VAT the deadline for notifying PAYE and VAT uncertainties in needs to be amended.

4. As presently drafted the legislation does not comply with our *Ten Tenets for a Better Tax System* by which we benchmark the tax system and changes to it (summarized in Appendix 2), especially Tenets 2: Certain, 3: Simple, and 4: Easy to collect and calculate.

5. Further details on each of these issues and suggested legislative amendments are set out below.

THE MEASURE IN BRIEF

6. The notification of uncertain tax treatments regime is being introduced to provide HMRC with a greater and earlier awareness of positions that large businesses have taken in their tax returns that are, based on the definitions included in the regime, considered to be 'uncertain'. There are two triggers, either of which would cause a position to be classed as uncertain:
    - provision has been recognised in the accounts of the company, or a member of the partnership, to reflect the probability that a different tax treatment will be applied to a transaction to which the amount relates; or

- the tax treatment applied in arriving at the amount relies (wholly or in part) on an interpretation or application of the law that is not in accordance with the way in which it is known that HMRC would interpret or apply the law.

7. Broadly speaking, the measure applies to businesses (including companies and partnerships) or groups with annual UK turnover of over £200m or UK net assets of more than £2bn.

8. The taxes to which this measure relate are corporation tax, income tax (in relation to partnership profits and PAYE matters) and VAT. 'Tax returns' therefore include all returns related to such taxes.

9. A de-minimis threshold applies so that businesses do not need to notify HMRC of every uncertainty in their tax returns. The deadline for the notification depends on the tax concerned and is expressed with reference to the business' financial year which is broadly the period for which it prepares its accounts.

DISCOVERY ASSESSMENTS

THE MEASURE

10. HMRC is able to raise assessments in relation to income and corporation tax returns beyond the usual 12-month enquiry window by raising what is known as a "discovery assessment". Under existing legislation, something cannot be "discovered" it has already been disclosed to HMRC. The legislation contains a list of documents in which such as disclosure can be made. This list is included in the tax legislation at s29 (6) TMA 1970. If something is not on the list, then case law to date generally shows that its existence is ignored when deciding if HMRC could issue a valid discovery assessment**.**

11. Equivalent provisions also apply for VAT and PAYE returns.

OUR CONCERN

12. At present, a notification under the uncertain tax treatments regime is not included in the list. We are therefore concerned that it will not constitute a disclosure for these purposes.

13. This would mean that HMRC could raise an assessment in respect of a return beyond the normal enquiry window even where the business concerned has provided information in its uncertain tax treatment notifications that indicates that such an assessment is unnecessary. This could cause unnecessary costs and uncertainty both for the business concerned and HMRC.

OUR RECOMMENDATION

14. We therefore suggest that a supplementary clause is inserted into schedule 15 to expand s29(6) TMA 1970 to add to the list of items treated as made available to HMRC. This would state that information is made available if "it is contained in the taxpayer's notification of uncertain tax treatment under para 8 of schedule 15 of FA 2022 or in the information provided to HMRC which is referred to at Para 18(1)". The latter part after the 'or' above is intended to cover any informal notifications to HMRC that then means that the formal NUTT is not required.
15. Equivalent supplementary provisions could also be included for VAT and PAYE purposes.

QUANTIFICATION OF TAX ADVANTAGE

THE MEASURE

16. Paragraphs 12 and 13 of schedule 15 define what is meant by a tax advantage for the purposes of this regime for income/corporation tax and VAT respectively. The specific purpose for defining a tax advantage is to determine whether the threshold test at paragraph 11 has been met. This dictates whether a potential tax advantage is large enough to be notified to HMRC. The definition is also used to quantify the size of the tax advantage to be notified.

17. Where the tax position taken by the business in the relevant return results in a lower amount of tax than under the position taken by HMRC, it is clear that the tax advantage is the difference between these two amounts. However, where the tax advantage is a deferral of tax or acceleration of input VAT, as allowed for in paras 12 (e) and 13 (c) respectively, arguably there is no tax advantage.

OUR CONCERN

18. Our concern is that including deferral of tax or acceleration of input VAT within the definition of tax advantage makes it difficult to quantify the tax advantage arising. On the face of it, the advantage is nil. Indeed, paragraph 14 states that the value of a tax advantage is the additional amount due or payable in respect of the tax.

OUR RECOMMENDATION

19. To reduce uncertainty and the number of notifications that businesses need to make and HMRC needs to deal with, we recommend that tax deferral and acceleration of input VAT are removed from the definition of tax advantage in paragraphs 12 and 13.

SUGGESTED AMENDMENTS

20. We suggest that the following provisions are deleted:

    a. Paragraph 12 (e)

    b. Paragraph 13 (1) (c)

TRANSFER PRICING

THE MEASURE

21. Paragraph 19 of the original draft legislation published in July 2021 included an exemption from the regime where the tax uncertainty related to the pricing of intra-group transactions (commonly referred to as ‘transfer pricing’). However, this exemption only applied where a notification trigger was met that has since been removed from the provisions in the finance bill. The exemption has therefore been removed as well.

OUR CONCERN

22. In our written response to the draft legislation we argued that the transfer pricing exemption should apply to all the notification triggers. We remain concerned that if businesses are required to notify HMRC of every transfer pricing uncertainty that is large enough to require notification, this will result in a considerable administration burden, both for large businesses and HMRC.

23. The trigger under which notification of transfer pricing is most likely to occur is the one set out in paragraph 9 (2) – (the accounting provision trigger). We understand that businesses make such provisions under accounting standard IFRC23 as a matter of course where there is any uncertainty over the pricing of the transaction concerned.

OUR RECOMMENDATION

We recommend that an exemption for transfer pricing arrangements is included in the legislation to apply to both remaining notification triggers.

SUGGESTED AMENDMENT

24. Our suggestion is to insert paragraph 19 of the original draft legislation into schedule 15, but amended such that sub-para (1) (b) is removed from the paragraph and the 'and' at the end of this sub-paragraph is added to the end of para 19 (1) (a).

NOTIFICATION OF VAT UNCERTAINTIES

THE MEASURE

25. There is a table in paragraph 9 of Schedule 15 which sets out the deadlines by which notifications are required. It says that for a notification of an amount included in a VAT return delivered to HMRC for a financial year where the amount was uncertain at the time the return was submitted, the deadline is on or before the date on which the last VAT return for the financial year is required to be made

OUR CONCERN

26. The law as drafted is not logical for VAT purposes because VAT returns are made in respect of VAT periods, not financial years, unless HMRC has acceded to a specific request by a business to align its VAT accounting year to its financial year.

OUR RECOMMENDATION

27. We consider that it makes more logical sense for a VAT uncertainty to be notified at or around the time when the uncertainty is most likely to be under consideration by the business, rather than at a time arbitrarily determined by the business' financial year. We also consider that a deadline of just one month and seven days after the end of the financial year is too short a time period in which to make the relevant notification, a deadline that many businesses would struggle to meet.

28. We note that a partially exempt business would normally make any necessary adjustments to its input VAT claims in the VAT return following the end of the VAT year to which it relates. We consider that the deadline for submitting this return (one month and seven days after the end of the VAT quarter concerned, assuming quarterly VAT accounting is followed) would make a logical deadline by which an uncertain tax treatment notification for the previous VAT year should be made. Assuming the business adopts the default of VAT quarterly accounting, this would also give it an extra three months in which to make the notification compared to the shortest amount of time a business would be given under the current proposals.

29. Accordingly, we suggest that for VAT uncertainties, the deadline should be four months and seven days after the end of the VAT year in relation to which the uncertainty arose. We believe that this deadline should apply whether the business applies monthly, quarterly or annual VAT accounting.

NOTIFICATION OF PAYE UNCERTAINTIES

THE MEASURE

30. The table in paragraph 9 of Schedule 15 also includes a deadline for notification of an amount included in a PAYE return delivered to HMRC for a financial year where the amount was uncertain at the time the return was submitted, the deadline being on or before the date on which the last PAYE return for the financial year is required to be made.

OUR CONCERN

31. Again, this potentially creates a very short time frame in which to make a notification if the uncertainty arose in the last PAYE return of the financial year. If PAYE returns are made on a monthly basis, the return and corresponding notification would need to be made before the end of the month to which the return relates.

OUR RECOMMENDATION

32. We consider that a more logical and more realistic deadline would be set by de-coupling PAYE notifications from financial years and setting a deadline of 6 July for any PAYE uncertainties arising in each tax year (6 April to 5 April) to coincide with the filing deadline for P11Ds. It is more likely that uncertainties would arise in relation to the tax treatment of benefits than with salary and so such uncertainties are likely to be under consideration around the time that P11Ds are being prepared.

NOTIFICATION OF UNCERTAINITES WHERE PARA 8 (2) (b) APPLIES

THE MEASURE

33. The table at paragraph 9 also includes a deadline for notifications of amounts that become uncertain as a result of the business making a provision for that uncertainty in its accounts. That deadline appears to be the date that the notification would have needed to be made had the uncertainty existed at the time the relevant return was submitted.

OUR CONCERN

34. If we have understood this deadline correctly, it does not appear to make sense as it would suggest that the deadline would never be met because the amount would not have become uncertain until after the relevant return had been filed.

OUR RECOMMENDATION

35. We recommend that the deadline in such cases should be one month after the date that the amount became uncertain, if this is later than the date that the relevant return was filed.

FURTHER INFORMATION

36. As part of our Royal Charter, we have a duty to inform policy in the public interest.

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APPENDIX 1

ICAEW TAX FACULTY – WHO WE ARE

Internationally recognised as a source of expertise, ICAEW Tax Faculty is a leading authority on taxation and is the voice of tax for ICAEW. It is responsible for making all submissions to the tax authorities on behalf of ICAEW, drawing upon the knowledge and experience of ICAEW's membership. The Tax Faculty's work is directly supported by over 130 active members, many of them well-known names in the tax world, who work across the complete spectrum of tax, both in practice and in business. ICAEW Tax Faculty's *Ten Tenets for a Better Tax System* are summarised in Appendix 2.

ICAEW is a world-leading professional body established under a Royal Charter to serve the public interest. In pursuit of its vision of a world of strong economies, ICAEW works with governments, regulators and businesses and it leads, connects, supports and regulates more than 186,500 chartered accountant members and students around the world. ICAEW members work in all types of private and public organisations, including public practice firms, and are trained to provide clarity and rigour and apply the highest professional, technical and ethical standards.

APPENDIX 2

ICAEW TAX FACULTY'S TEN TENETS FOR A BETTER TAX SYSTEM

The tax system should be:

1. Statutory: tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.
2. Certain: in virtually all circumstances the application of the tax rules should be certain. It should not normally be necessary for anyone to resort to the courts in order to resolve how the rules operate in relation to his or her tax affairs.
3. Simple: the tax rules should aim to be simple, understandable and clear in their objectives.
4. Easy to collect and to calculate: a person's tax liability should be easy to calculate and straightforward and cheap to collect.
5. Properly targeted: when anti-avoidance legislation is passed, due regard should be had to maintaining the simplicity and certainty of the tax system by targeting it to close specific loopholes.
6. Constant: Changes to the underlying rules should be kept to a minimum. There should be a justifiable economic and/or social basis for any change to the tax rules and this justification should be made public and the underlying policy made clear.
7. Subject to proper consultation: other than in exceptional circumstances, the Government should allow adequate time for both the drafting of tax legislation and full consultation on it.
8. Regularly reviewed: the tax rules should be subject to a regular public review to determine their continuing relevance and whether their original justification has been realised. If a tax rule is no longer relevant, then it should be repealed.
9. Fair and reasonable: the revenue authorities have a duty to exercise their powers reasonably. There should be a right of appeal to an independent tribunal against all their decisions.
10. Competitive: tax rules and rates should be framed so as to encourage investment, capital and trade in and with the UK.

These are explained in more detail in our discussion document published in October 1999 as TAXGUIDE 4/99 (see https://goo.gl/x6UjJ5).