

Written evidence submitted by the Chartered Institute of Taxation (CIOT) (FB13)

Representation for Finance Bill 2021-22 Public Bill Committee

Large businesses: notification of uncertain tax treatment Clause 94 and schedule 15

Executive Summary

While HMRC engagement with stakeholders has led to improvements to this measure during the consultative process, we still do not believe this measure will be effective, and nor is it proportionate or necessary.

Steps could be taken within the existing tax administration framework that would be worthwhile and effective, without the additional compliance burden of this measure, and these steps will largely be required to make this measure a success in any event.

It is not clear to us how this measure will itself impact on the legal interpretation tax gap, given that HMRC already have extensive powers to open an enquiry into, and investigate, a tax return, from which any disputes in respect of legal interpretation can be addressed. Indeed the expected revenue from this measure is very low compared to the overall legal interpretation tax gap – barely above half of one per cent of it in any year.

Our alternative proposals for reducing tax uncertainty and the legal interpretation tax gap include:

- Drafting clearer legislation and signposting HMRC's position more clearly in manuals;
- Continuing to explore improvements to the tax return enquiry process aimed at accelerating resolutions and preventing disputes arising in the first place;
- Empowering HMRC's customer compliance managers (CCMs) to enable them to answer businesses' questions about whether they have got a position right;
- Developing HMRC's capacity to provide tax rulings and/or clearances (an area where the UK lags internationally), including through the current 'Review of tax administration for large businesses'.

If the Government press ahead with this measure they should ensure that:

- All businesses within its scope are entitled to a CCM, either by reducing the cut off for inclusion in this measure or expanding the CCM regime;
- Clarity how this measure interacts with the rules dealing with discovery assessments;
- Ensure that HMRC has the resources to ensure published guidance is comprehensive, clear and up to date.

1.	Overview
1.1.	This clause places new obligations on large businesses to notify HMRC where they have taken a tax position that is, according to criteria set out in the legislation, uncertain.
1.2.	Large businesses are defined as those with a turnover above £200 million or a balance sheet total over £2 billion. A threshold of £5 million will apply - uncertain tax amounts with a tax advantage below this threshold will not need to be notified to HMRC.
1.3.	Uncertain tax treatments are defined by two criteria (triggers, in the government's terminology): that a provision has been made in the accounts for the uncertainty, or that the position taken by the business is contrary to HMRC's known interpretation (as stated in the public domain or in dealings with HMRC).
1.4.	A third criterion which was included in draft legislation published in the summer (that of where there is a substantial possibility that a tribunal or court would find the taxpayer's position to be incorrect) is not included in the legislation, although the government says it is still considering this trigger for possible inclusion later.
1.5.	The stated objective of this measure is to reduce the legal interpretation portion of the tax gap. It aims to ensure that HMRC is aware of all cases where a large business has adopted a treatment with which HMRC may disagree and accelerate the point at which discussions occur on these uncertain tax treatments. It will also identify areas of law that are currently unclear and allow HMRC to focus on clarifying these areas of uncertainty, ultimately resulting in fewer disputes caused by uncertainty in the tax law.
1.6.	The legal interpretation part of the tax gap is about tax that is not necessarily legally due. It is defined as where the taxpayer's and HMRC's interpretations of the law and how it applies to the facts in a particular case result in different tax outcomes. We understand that calculating the legal interpretation tax gap figure arriving at this figure is a complicated process involving 'top down' inputs around overall consumption and other statistical measures based on HMRC historic case data. Anticipating future changes to the overall legal interpretation tax gap involves assumptions and judgements around behaviour, based on historic data about HMRC's dispute settlements, reflecting that however a dispute is resolved, the tax being disputed will fall out of the legal interpretation tax gap going forward, as the point of uncertainty has become settled. Thus, it is clear that arriving at an estimation of the legal interpretation tax gap is difficult, and anticipating changes to it, and consequently, any expected revenue that may be raised is harder still.
1.7.	The legal interpretation portion of the tax gap is currently estimated by HMRC at £5.8 billion (in 2019-20). £3.2 billion of this is attributed to large businesses. According to the Tax Information and Impact Note for this measure, its total exchequer impact will peak at £35 million in 2023-24, falling to just £20 million by 2026-27. Against this HMRC estimate

	ongoing costs of up to around £3 million per annum, across all large businesses, and a cost to HMRC of £15 million over six years. ¹
2.	CIOT comments
2.1.	CIOT is unconvinced that this measure is needed. We are unpersuaded that it will achieve the stated policy aims effectively or proportionately.
2.2.	Although improvements made during the consultative process (see below) mean that the measure as set out in the bill will be easier to comply with, it will still be an additional compliance burden for all large businesses, including the majority that are already open and transparent in their dealings with HMRC.
2.3.	We support the government taking action to reduce the legal interpretation portion of the tax gap. However, in our view, this can be achieved without this legislation. Steps could be taken within the existing tax administration framework that would be worthwhile and effective, without the additional compliance burden of this measure, and these steps will largely be required to make this measure a success in any event. (We set some of these out in paragraphs 2.8 to 2.14.)
2.4.	We understand that HMRC do not expect the legal interpretation part of the tax gap to be impacted immediately by the mere introduction of this measure, and that further action will have to be taken by HMRC. For example, if HMRC are made aware of areas of uncertainty through the notification, they may dispute the tax position. In addition, we understand that the intention is that, as a result of the information received around areas of uncertainty, the government may seek to amend or clarify the law to ensure outcomes aligned with HMRC's interpretation of the law. However, it is not clear to us why these actions could not be taken as result of information obtained through judicious enquiries being raised into the relevant returns and as a result of discussions which are already happening with customer compliance managers (CCMs) and through the Business Risk Review Plus (BRR+) process. Even in circumstances where HMRC are involved in a lengthy dispute which has highlighted an area of uncertainty, in practice we suggest that HMRC should be able to identify from the business they are looking at what hallmarks would identify other taxpayers facing a similar issue, and raise the appropriate enquiries.
2.5.	Thus it is not clear to us how this measure will itself additionally impact on the legal interpretation tax gap, given that HMRC already have extensive powers to open an enquiry into, and investigate, a tax return, from which any disputes in respect of legal interpretation can be addressed.
2.6.	As the numbers in paragraph 1.7 above indicate, the expected revenue that will be raised from this measure is very low compared to the overall legal interpretation tax gap – barely above half of one per cent of it in any year.

¹ These numbers are all taken from the Tax Information and Impact Note for this measure - <https://www.gov.uk/government/publications/notification-of-uncertain-tax-treatment-for-large-businesses/notification-of-uncertain-tax-treatment-for-large-businesses>

2.7.	Against this must be set compliance costs estimated by HMRC at around £3 million per year. This amounts to around £1,300 per business affected, which seems optimistic to us. Even on HMRC's figures, this puts the costs of ongoing compliance for large business at more than 10 per cent of projected yield. We note that the House of Lords Finance Bill Sub-Committee considers this disproportionate ² . We have some sympathy with this view.
2.8.	We understand from our discussions with HMT and HMRC that the potential tax raised for the Exchequer from this measure is only one of the policy aims. It is also intended to encourage businesses that do not currently act in a compliant and co-operative basis with HMRC to do so. However, we are not convinced that this measure will change the fundamental behaviour of those that do not wish to act in this way.
2.9.	In connection with this we note that the penalties in relation to this measure are relatively small: £5,000 for the first failure, and £25,000 and £50,000 for repeated failures, compared with a tax amount which has to be over £5 million. This is unlikely to be enough to change the behaviours of non-compliant businesses. For large businesses that are compliant, the level of penalties is largely irrelevant – they are more concerned about damage to their reputation if they were found to be non-compliant – which is why many will consider notifying ‘everything’ in order to be sure that they are compliant. (NB. This is less helpful to HMRC than it sounds – it could overwhelm HMRC with notifications that they do not want or are unable properly to review.)
	<i>Alternatives to this measure</i>
2.10.	With regard to reducing the legal interpretation tax gap, we believe that a number of things could be done to make the position clearer in respect of legislative matters and thus reduce the number of differences around legal interpretation that arise. These measures include drafting clearer legislation, signposting HMRC's position more clearly in its manuals (including when this position has changed) and redacting the manuals less often, as well as generally updating, rewriting and improving the guidance and notices.
2.11.	In relation to tax disputes, we note HMRC's acknowledgement in this summer's call for evidence on the Tax Administration Framework that the tax return enquiry process, as it stands, “does not promote the early resolution of issues” ³ . We welcome the focus in this project on what can be done to accelerate resolution or prevent disputes arising in the first place. Steps in this direction will also help to reduce tax uncertainties.
2.12.	In addition, we believe that areas of uncertainty could be addressed more effectively than by this notification measure through more active and reciprocal discussion between businesses and their CCMs. The focus of this measure is on businesses providing information and being more open and helpful with HMRC, whilst the issue with collaborative compliance for large businesses in practice is that HMRC are effectively unable to reciprocate effectively

² Paragraph 128, *Basis Period Reform and Uncertain Tax Treatments*, House of Lords Economic Affairs Finance Bill Sub-Committee, 15/12/21

(<https://committees.parliament.uk/publications/8236/documents/84212/default/>)

³ P28, <https://tinyurl.com/bdh8yx7a>

	<p>to the full extent of businesses’ existing willingness to engage. CCMs are often not empowered to make case by case decisions, and the legislation does not accommodate a clearance process for most issues, particularly if it is difficult to identify any significant degree of uncertainty. Some CCMs might be prepared to confirm to a taxpayer that ‘you have got the position right’, but others may feel they have to stick to the letter of the HMRC guidance process. Addressing this lack of reciprocation in the current system could ensure that more uncertainties are resolved in a more timely manner.</p>
2.13.	<p>More generally, it is often reported to us that HMRC do not engage with requests for a view of a particular tax treatment from taxpayers. If a taxpayer considers there is sufficient uncertainty and they or their adviser write to HMRC, if HMRC were obliged to respond setting out HMRC’s view clearly, this would reduce uncertainty for compliant taxpayers and encourage taxpayers to seek clarification. Where perceived uncertainties among taxpayers were resolved in favour of HMRC’s positions, then businesses would likely either have accepted the implied tax cost or organised their affairs in a different way. Where the uncertainty was resolved differently, HMRC would have an earlier opportunity to decide whether to accept the implications of that, or to take other action such as proposing legislative change to ministers.</p>
2.14.	<p>We note that the government conducted a ‘Review of tax administration for large businesses’ over the course of this year to better understand large businesses’ experiences of UK tax administration. The review focussed on the degree to which the current administration framework provides businesses with early certainty where appropriate, ensures the efficient resolution of disputes in accordance with the law, and promotes a collaborative and constructive approach to compliance with the law. These are similar considerations to the policy aims of this measure. An update on the progress of this review was published on 30 November⁴. This update announced a number of areas where the government is intending to take action to improve tax administration for large businesses. The areas identified for action are: mitigating uncertainty through new guidelines for compliance and improved guidance, changes to help address long running enquiries and improving the co-operative compliance experience. There is considerable overlap between these areas and the actions that HMRC is intending to take in order to support large businesses in relation to the new measure of notification of uncertain tax treatment. Thus, we suggest that this initiative could produce outcomes that would assist with reducing the legal interpretation tax gap, without adding to the compliance burden of large businesses by requiring a notification of uncertain tax treatments. These actions could also provide an opportunity whereby the government and HMRC could deliver more certainty by developing its capacity, for example, to provide clearances. As a general point the UK is behind the international field with regard to tax rulings or clearances (accepting that businesses in some jurisdictions have to pay for these). It is not clear to us how this measure will itself additionally impact on the legal interpretation tax gap, but it will present a significant new compliance burden for large businesses.</p>
	<p><i>Potential improvements to this measure</i></p>

⁴ <https://tinyurl.com/ycknm8x>

2.15.	If the Government are, as it seems, intent on pressing ahead with this measure we have a number of suggestions of how it might be improved, to ameliorate its impact and to remove uncertainties. These are set out in paragraphs 2.16 – 2.20. We note that further recommendations are set out in the recent report of the House of Lords Finance Bill Sub-Committee covering this measure. ⁵
2.16.	<i>Large businesses without a CCM</i>
2.17.	The population of large businesses within scope of this measure will include some businesses without CCMs. This introduces a significant disparity between businesses that has been recognised throughout the consultation process. The discrepancy arises in particular in relation to the general exemption from the requirement to notify uncertain tax treatments, which will apply in circumstances where a business has already told HMRC about the uncertain 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. It is intended that businesses without a CCM should be given the same opportunity to avail themselves of this exemption utilising an existing mechanism which enables businesses to contact HMRC’s Customer Engagement Team online.
2.18.	We remain unconvinced that this mechanism will provide anything close to parity of treatment between businesses with a CCM and those without, although large businesses without a CCM will be subject to the same compliance obligations; this seems to us to be fundamentally unfair.
2.19.	Ensuring fairness as between taxpayers is of utmost importance. This is an issue which is arising in relation to a number of different proposed compliance obligations; for example a similar issue arises in relation to the proposals around changes to <i>Transfer pricing documentation</i> that have also been consulted on ⁶ . We have suggested that one solution would be to set the cut off for these additional compliance burdens at the same level as that at which businesses become entitled to a CCM. Alternatively, we suggest that the government should consider expanding the CCM regime so that all businesses which are generally considered to be ‘large’ for the purpose of additional compliance burdens are treated comparably. We note that this was also a recommendation of the House of Lords Finance Bill Sub-Committee in their report, published on 15 December. We recognise that this would present a resource issue for HMRC, but it is difficult to see how it will be possible to replicate this exemption without replicating the CCM system and, therefore, effectively extending it.
	<i>Discovery assessments</i>
2.20.	We would welcome clarity around how this measure interacts with the rules dealing with discovery assessments. The point is whether a business’s notification will count towards protecting it against HMRC later trying to issue a discovery assessment if it transpires that too little tax was paid in relation to the uncertain tax treatment (and HMRC did not open an enquiry). Our view is that the business has given HMRC the information so that information

⁵ *Basis Period Reform and Uncertain Tax Treatments*, House of Lords Economic Affairs Finance Bill Sub-Committee, 15/12/21 (<https://committees.parliament.uk/publications/8236/documents/84212/default/>)

⁶ [Transfer pricing documentation - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/transfer-pricing-documentation)

	should count towards protection from discovery. From statements in the response to the first consultation on this measure we think this may also be HMRC's view ⁷ . However the legislation does not reflect this.
2.21.	This could be resolved by amending the list of material that HMRC can reasonably be expected to be aware of ('information made available') in the legislation on discovery assessments (Taxes Management Act 1970) to add in a notification under this measure.
2.22.	We suggest, therefore, that the Bill should include a new clause which will amend TMA 1970 section 29(6) to add a new point to the effect: <i>'it is contained in the taxpayer's notification of uncertain tax treatment under paragraph 8 of schedule 15 of Finance Act 2022 or in the information provided to HMRC which is referred to at paragraph 18(1) of that schedule'</i> .
2.23.	The latter bit of this suggested amendment, after the 'or', is intended to cover any informal notifications to HMRC that then mean a formal notification of uncertain tax treatment is not required.
2.24.	This suggested amendment to TMA 1970 section 29 should cover partnership returns by virtue of TMA section 30B(7). A similar new clause would be needed for the corporation tax equivalent of section 29(6), that is to say a similar amendment to FA 1998 Schedule 18 paragraph 44(2). A similar amendment would be required in respect of PAYE and VAT. This could be dealt with by an amendment to the regulations dealing with those taxes.
	<i>Clear, up to date guidance</i>
2.25.	The second trigger of uncertainty is whether the tax treatment applied by a company differs from HMRC's known position. For this to be effective HMRC must have a known position and it must be possible for large businesses to discern it.
2.26.	To achieve this may require a thorough review of published material, as well as consideration of whether it is up to date – in this regard, we welcome HMRC's creation of a new working group to consider areas of HMRC guidance that would benefit from improvement. It is also vital that businesses can rely on the various forms of guidance published by HMRC, and that HMRC provide timely and transparent updates when guidance changes.
2.27.	The House of Lords Finance Bill Sub-Committee has stated that: "The operation of the second trigger is dependent on HMRC's published guidance being clear, unambiguous and up- to- date. The Government must ensure that sufficient resources are made available to HMRC to ensure that its published guidance is updated on an ongoing basis." ⁸ We agree.
2.28.	<i>The 'third trigger'</i>
2.29.	As noted in paragraph 1.4, a third 'trigger' which was included in draft legislation published in the summer is not included in this legislation, but the government says it is still considering it for possible inclusion later.

⁷ See paragraphs 3.93 and 3.94 of <https://tinyurl.com/bdh7vrk3>

⁸ Paragraph 116, <https://committees.parliament.uk/publications/8236/documents/84212/default>

2.30.	We welcomed its removal. The third trigger defined an uncertain tax treatment around an inevitably hypothetical view of what a tribunal or court might find to be incorrect in respect of a tax treatment; it was loosely drafted and poorly conceptualised. Its inevitably uncertain application would have undermined this measure. We would be against its addition to this legislation at a later point.
3.	The Chartered Institute of Taxation
3.1.	The Chartered Institute of Taxation (CIOT) is the leading professional body in the United Kingdom concerned solely with taxation. The CIOT is an educational charity, promoting education and study of the administration and practice of taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. The CIOT’s work covers all aspects of taxation, including direct and indirect taxes and duties. Through our Low Incomes Tax Reform Group (LITRG), the CIOT has a particular focus on improving the tax system, including tax credits and benefits, for the unrepresented taxpayer.
3.2.	The CIOT draws on our members’ experience in private practice, commerce and industry, government and academia to improve tax administration and propose and explain how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries. The CIOT’s comments and recommendations on tax issues are made in line with our charitable objectives: we are politically neutral in our work.
3.3.	The CIOT’s 19,000 members have the practising title of ‘Chartered Tax Adviser’ and the designatory letters ‘CTA’, to represent the leading tax qualification.