

# Uncertain tax positions: preparing for further tax disclosure

## Overview

The UK government is pressing ahead with its proposal to require large businesses to notify their “uncertain tax positions” to HMRC.

### Why? What does the government hope to achieve?

The government has stated that it wants to reduce the “legal interpretation tax gap”, that is, tax revenue lost as a result of differing legal interpretations of the tax code. It estimates that the legal interpretation tax gap for 2018-19 was GBP4.9 billion, larger than the gap caused by tax evasion (GBP4.6bn)<sup>1</sup>.

However, the government’s hopes for quantifiable yield from the new measures are more modest by comparison. Perhaps more significantly, HMRC has said that the underlying aim of the new requirement is to obtain information to assist in identifying and resolving disagreements at an earlier stage. The measure will constitute yet a further weapon in the government’s disclosure arsenal, to add to provisions such as the disclosure of tax avoidance schemes (DOTAS) rules, as well as various cross-border disclosure requirements imposed under UK law as a result of EU and OECD initiatives.

“For businesses within scope, the measure represents yet another hurdle to negotiate in an increasingly complex and costly compliance landscape.”

## A slow development

The policy was first announced as part of the Spring 2020 Budget; a (first) consultation document published shortly afterwards in March 2020 anticipated a start date of April 2021. As initially formulated, the requirement to disclose was very broadly drafted, and purported to apply to any position which HMRC was likely to challenge. The proposal was almost universally unpopular amongst practitioners and commentators. As a result, and exacerbated by delays caused by COVID-19, the government agreed to defer commencement until April 2022 pending further consultation.

A second consultation was subsequently published in March 2021 (together with responses to the first consultation) and the deadline for responses is 1 June 2021.

The government intends to include draft legislation in the Finance Bill 2021, and for the requirement to apply to returns filed after April 2022.

## Key features of the regime

### Scope

Under the most recent iteration of the proposals, the requirement to disclose will apply:

- To companies, partnerships and LLPs;
- With an annual turnover exceeding GBP200 million and/or a balance sheet exceeding GBP2bn, although it is specifically provided that the assets of fund portfolio companies will not contribute to turnover or balance sheet in the case of asset managers;
- In relation to corporation tax, income tax (including PAYE) and VAT. Although the first consultation additionally contemplated that the measure would apply to customs and excise duties, IPT, stamp duties, SDLT, bank levy and PRT, these taxes are no longer in scope; and
- Subject to a de minimis threshold of GBP5m, individually or combined. In other words, there should be a difference of at least GBP5m between HMRC's calculation of the tax liability and that of the taxpayer.

### Exclusions

There will be exclusions for arrangements that have already been notified under separate legislative requirements such as DOTAS and in other circumstances in which HMRC is already aware of the uncertainty, including as a result of discussions with HMRC under the Banking Code of Conduct.

The exclusion will also extend to tax treatments discussed with a business's Customer Compliance Manager (CCM). Where a CCM is not already in place, HMRC confirms that equivalent arrangements for communication will be introduced.

### Penalties

A business that fails to disclose in accordance with the rules will be subject to a maximum penalty of GBP5,000.

The earlier suggestion that there would be an additional fine on the individual responsible within the organisation has been dropped.



## Definitely, maybe, certainly uncertain

The trigger for disclosure proposed in the first consultation document was simply that the business believed that HMRC might not agree with its interpretation of the law or guidance. Most respondents to the consultation were critical of this essentially subjective approach, and certainly this is arguably the aspect of the proposals that has changed the most significantly.

Instead, the second, March 2021 consultation denotes seven, more targeted, triggers. Specifically, a notification requirement will arise where a business applies a tax treatment that:

- (a) is different to HMRC's known position;
- (b) is different to published industry practice;
- (c) represents a change from the treatment applied to an equivalent transaction in a previous return (and the change is otherwise than as a result of a change in law or HMRC policy);
- (d) "is in some way novel such that it cannot reasonably be regarded as certain";
- (e) has necessitated an accounting provision to recognise the possibility of a different tax treatment being applied;
- (f) produces a tax mismatch (that is, either a tax deduction greater than the amount incurred by the business or an income receipt for which an equivalent amount is not reflected for tax purposes), unless HMRC is known to accept the treatment; or
- (g) has been the subject of professional advice which is contradictory to previous professional advice or which is not followed and, in either case, is not subject to legal professional privilege.

Although these specific triggers represent a narrowing of their more wide-ranging predecessor, there is still significant ambiguity.

In particular, in the context of trigger (b), it is not yet clear what will constitute "published industry practice". The consultation paper suggests that an approach "published in HMRC manuals or guidance provided by trade representative bodies" would engage the industry practice trigger (trigger (b)). There is therefore clearly some overlap between trigger (a) and (b) and the distinction between the two is not obvious. A related concern is that that effectively attaching legal obligations to guidance published by trade bodies may place unduly burdensome additional obligations on both taxpayers and the bodies themselves. In addition, which organisations constitute trade bodies for this purpose? Who decides?

In the context of trigger (d), the interpretation of "novel" may also be difficult. Does it mean simply unusual? If so, as compared to what benchmark?

Trigger (g) may also be problematic. In the first place, it may be difficult to pinpoint what constitutes contradictory advice. Is the notification requirement triggered if a taxpayer receives a firm opinion from one adviser and a slightly more caveated opinion from a second adviser? Similarly, we do not know whether HMRC will deem a client "not to have followed" professional advice when the adviser presents multiple reasonable options to the client, with each option carrying a slightly different risk assessment. A taxpayer which has taken a cautious approach and sought multiple opinions should not be unfairly penalised if one of these opinions is clearly anomalous or demonstrably incorrect.

Interestingly, the consultation document does not provide any indication of which triggers are likely to capture the most significant share of the legal interpretation tax gap.

## How should business prepare?

For businesses within scope, the measure represents yet another hurdle to negotiate in an increasingly complex and costly compliance landscape. Although it was clearly preferable for the initially widely drawn and subjective criterion to be narrowed, the multiplicity of possible triggers may itself increase the compliance burden.

As always, the devil will be in the detail, and the draft legislation has yet to be published. Even once the legislation is in final form, it is possible, even likely, that any relevant HMRC guidance will be at least as important.

However, it is clear that the exclusion for tax treatments already under discussion with HMRC will place an increased premium on a taxpayer's good relationship and communication with HMRC.

Please do not hesitate to contact us if you would like to discuss this proposal and how it could affect your business. Meanwhile, Allen & Overy is participating in industry responses to the second consultation.

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## References

- 1 [HMRC Annual Report and Accounts 2019 to 2020, page 24.](#)

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