Notification of uncertain tax treatment by large businesses

Response to HMRC's consultation document of 19 March 2020 by the Tax Law Review Committee of the Institute for Fiscal Studies

Executive Summary

This is the response of the Institute for Fiscal Studies' Tax Law Review Committee ("**TLRC**") to the invitation to comment on the proposal contained in the Consultation Document published by HMRC on 19 March 2020 to introduce an obligation for a large business to notify HMRC where it has adopted an uncertain tax treatment.

The key points of our response are as follows:

1. We have been unable to identify a clear rationale for the proposal. The proposal should be properly targeted with a clearly stated objective that addresses an issue arising from current compliance measures and that takes account of existing reporting and compliance obligations.

2. It is impossible for consultees to respond satisfactorily to a consultation that fails to explain exactly what the proposal is intended to achieve, and how it relates to existing obligations to report and pay tax.

3. The failure to articulate a clear rationale for the proposal is the essential weakness of the Consultative Document. It is compounded by the fact that the specific proposals for implementing the stated policy appear divorced from that policy and include a variety of impractical or objectionable elements.

4. The Consultative Document makes no attempt to relate the notification proposal to existing measures designed to secure co-operative compliance; it does not explain the gaps (if any) that HMRC have identified in those existing measures and whether those gaps are of a general nature or relate to a particular subset of large companies which may, in some way, be non-compliant notwithstanding those other measures.

5. Accordingly, it is not possible to conclude that the proposal is a sensible, proportionate or necessary additional compliance obligation to impose on large business. We think it likely that the costs involved for large business in complying with the proposal in its current form would far exceed the forecast yield of the proposal. Put simply, the Consultative Document offers no proof that the proposed measure is 'worth it' when comparing yield with additional compliance costs.

6. The Consultative Document refers to the definition of 'legal interpretation' that is used for the purpose of the tax gap estimates. However, this is not an appropriate definition for use in legislation. Moreover, the Consultative Document makes no attempt to relate the proposal to those estimates or to explain its impact on those estimates.

7. The Consultative Document essentially pays lip-service to the accounting requirement under IFRIC 23 to report uncertainty of income tax treatments. The relevance of IFRIC 23 to the notification proposal depends fundamentally upon resolving the real aim and rationale of the current proposal.

8. It is unacceptable that a large company should be at risk of a penalty just because it disagrees with HMRC's view of the law. Thus, the essential pre-requisites of an obligation to notify an uncertain tax treatment are:

a. the existence of clear public statements of HMRC's view of the law; and

b. a test of 'uncertainty' that is capable of judicial scrutiny and determination on an appeal against a penalty for failure to notify.

9. An objection to the use of published Revenue practice as a determinant of the duty to disclose, however, is that it effectively allows HMRC to determine the scope of the obligation, backed by a penalty that does not depend upon HMRC being able to show that their view is right.

10. A test of 'uncertainty' that is not open to judicial scrutiny and determination on appeal is plainly unacceptable as effectively imposing an unappealable penalty for failure to notify.

11. An obligation to notify would appear to arise for any substantive issue of tax liability that HMRC might litigate or does in fact litigate, unless the issue falls within a specific exclusion from notification. HMRC itself has an established matrix to assess its prospects of success in litigation, which seeks to evaluate the potential outcome in terms of the level of certainty or uncertainty that attaches to the position that HMRC is litigating.

12. In that respect, the current proposal effectively requires a company to anticipate HMRC's own assessment of the level of uncertainty involved. That is not an appropriate basis for a notification obligation coupled with a penalty for failure to notify.

13. We are unclear why the Government has chosen to consult at Stage 2 (Determining the best option and developing a framework for implementation including detailed policy design) of the Tax Consultation Framework rather than at Stage 1 (Setting out objectives and identifying options).

14. For all the above reasons, we believe that this proposal should be withdrawn.

15. If the Government believes that additional measures are needed to address the tax gap or to improve large business compliance, further consultation starting at Stage 1 and taking account of the responses to this consultation would seem the appropriate way forward.

Introduction

(1) This is a response by the Institute for Fiscal Studies' Tax Law Review Committee ("**TLRC**") to the invitation to comment on the issues raised in the Consultation Document published by HMRC on 19 March 2020 on proposals for the notification of uncertain tax treatment by large business.

(2) The TLRC was set up by the IFS in 1994 to consider whether the tax system was working as intended, efficiently and without imposing unnecessary burdens. Its role is to keep under review the state and operation of tax law in the UK, which it does by selecting particular topics for study. It does not seek to question Government policy as such but looks at whether existing or proposed arrangements achieve the stated policy in a satisfactory and efficient way.

(3) The Consultative Document followed an announcement in the March Budget that the Government intended to require large businesses to notify HMRC where they have adopted an 'uncertain' tax treatment. The proposal is said to be designed to improve HMRC's ability to identify issues where businesses have adopted a different legal interpretation to the view of HM Revenue and Customs.

(4) The purpose of our response is not to argue for or against the introduction of some form of further compliance obligation on large business to notify 'uncertain' tax treatments. The issue we address is whether HMRC's proposals as currently formulated make sense and, if not, what are the considerations that should inform any new notification proposal, should it be decided to implement such a proposal following the responses made to this initial consultation.

(5) We are aware that HMRC may already be re-thinking elements of the Consultative Document proposals in the light of discussions with a number of professional bodies and others; in particular, the relationship to the Senior Accounting Officer (SAO) regime, the adoption of a single notification for all taxes and the *de minimis* threshold. Nevertheless, in the absence of further published material to inform our response, our comments must inevitably focus on the proposals set out in the Consultative Document.

(6) The Consultative Document poses a number of questions on which responses are invited. We reproduce these at the end of our response with our replies and observations. We start, however, with a more general assessment of HMRC's proposals and the issues they raise.

The Consultative Document Proposal

(7) The Consultative Document proposes a new compliance obligation for large business, requiring them to notify HMRC of any occasion on which they have taken advantage of an uncertain tax treatment in reporting or paying tax. Failure to comply with this obligation would attract a penalty.

(8) We set out in paragraph (31) below the policy underlying this proposal, as we understand it having regard to what the Consultative Document says. The basic aim of the policy - to improve HMRC's ability to identify issues that may be open to dispute – is relatively easy to state, even if its satisfactory implementation may be more difficult. Nevertheless, we have found it impossible to identify a clear rationale for what is proposed:

- Is it designed to provide information that HMRC would not otherwise receive; i.e. to prevent reported tax positions or tax payments 'slipping' under the net because they are not otherwise identified and challenged?

- Is it to secure <u>earlier</u> notification of issues that HMRC would expect to be reported or identified in any event so that, as with the requirement to disclose particular tax

avoidance schemes (the "DoTAS" rules), remedial action can be considered and taken sooner than might otherwise be the case?

- Is it merely to require large corporate taxpayers who are prepared to take 'high risk' positions in reporting and paying tax to 'self-identify' to enable HMRC to focus its investigative resources more effectively?

- Is it designed to induce a behavioural change by deterring large corporate taxpayers from adopting an interpretation of the law that differs from HMRC's view of the law?

(9) While particular notifications might in practice serve a different function according to the circumstances of the case, each of the above may require different design characteristics to serve its particular objective. More importantly, however, it is impossible to design coherent proposals that mesh with the other compliance obligations imposed on large business without clarity on the real policy aim and rationale of the proposal. In the present context, it is impossible for consultees to respond satisfactorily to consultation that fails to explain exactly what the proposal is intended to achieve, and how it relates to other compliance obligations to report and pay tax.

(10) In this respect, the Consultative Document has all the signs of a vague 'budget starter' that has been launched without adequate thought, as a last minute idea for an addition to HMRC's armoury that might have some (miniscule) impact on the tax gap . As a result, the specific proposals that are put forward for implementing what is stated as the underlying policy appear divorced from the stated policy and include a variety of impractical or objectionable elements.

(11) Thus, for example:

- Although the Consultative Document contemplates 'exceptions' to the notification obligation, the new notification obligation appears unrelated to, and unintegrated with, existing compliance obligations to report and pay tax;

- Accordingly, notification may well be required of matters that would be reported to or come to the attention of HMRC in any event, without any indication of why it is necessary or appropriate to impose an additional compliance obligation (subject to a separate penalty) effectively to duplicate the provision of information;

- A single notification is proposed to apply across the board to a wide variety of taxes that differ significantly both in their structure, application and compliance obligations, such that it is difficult to understand how a single notification obligation could apply uniformly across the board and precisely what obligation it will impose on large companies to assess the proposed tax treatment of particular transactions;

- In some cases, it appears that the obligation to notify would arise before the company may have had to consider or will have been required to conclude on how it proposes to report and pay tax;

- The Consultative Document contemplates a *de minimis* threshold below which the obligation to notify would not arise but on a cumulative basis which, across a wide variety of taxes, some of which are imposed on gross transaction costs and a multiplicity of transactions, appears to negate the benefit of a threshold or impose its own significant compliance obligation in determining whether it applies;

- The Consultative Document pays lip-service to the existing accounting requirement to report uncertain tax treatments, but the proposed notification obligation bears little relationship to the accounting requirement;

- The Consultative Document suggests that the notification obligation would depend upon whether the company 'believes' that it is adopting a position that is at variance with the position that HMRC might adopt, which appears to provide a perverse incentive for companies to assess their position without particular enquiry into HMRC's position on the matter;

- On the other hand, the Consultative Document suggests that HMRC's position will depend upon an assessment of what view HMRC might take of how the company's arrangements should be taxed, which appears to require the company to guess what HMRC might or might not do in the future; and

- Furthermore, any case involving a substantive tax liability that HMRC might choose to litigate and, indeed, every such case that HMRC does in fact litigate, would have had to have been notified (and would be subject to a penalty if not) even though no tax avoidance is involved and irrespective of whether the outcome of the litigation is in HMRC's favour.

(12) We recognise that the objective of consultation is to identify issues with the particular proposals being consulted upon and, indeed, we understand that HMRC has already acknowledged a number of the deficiencies we have mentioned. Nevertheless, it is a matter for concern that such poorly formulated and explained proposals can be put forward, especially with the intent to legislate in any event, rather than being a genuine consultation to test whether such a measure is an appropriate response to a properly identified policy issue.

(13) We are also concerned that discussions with HMRC on the proposal, in which members of the TLRC have participated since the Consultative Document was published, have failed to provide a clear or coherent picture of the issue that HMRC currently perceive as needing to be addressed, or how the current proposal addresses that issue in a proportionate, targeted and well-structured way.

(14) We are left with the impression that the proposal is designed as yet another addition to HMRC powers (at a time at which HMRC is supposed to be reviewing the extent of its current powers rather than adding further powers) without adequate consideration of the issue that it is designed to address, irrespective of the compliance costs that may be involved, and with little consideration of the practicality of the proposal or of the real benefits to be derived from it.

(15) In particular, the large companies that are proposed to be subject to this new notification requirement already fall within the scope of a wide variety of measures designed to secure co-operative compliance. The Consultative Document makes no attempt to relate the notification proposal to those other measures; it does not explain the gaps (if any) that HMRC have identified in those other measures and whether those gaps are of a general nature or relate to a particular subset of large companies which may, in some way, be non-compliant notwithstanding those other measures.

(16) As discussed further below, the Consultative Document refers to the definition of 'legal interpretation' that is used for the purpose of the tax gap estimates. We accept that this may be a useful analytical tool for measuring HMRC responses, but it is not an appropriate definition for

use in legislation. Moreover, the Consultative Document makes no attempt to relate the proposal to those estimates or to explain its impact on those estimates. A significant further compliance obligation may be imposed on large business under the current proposals, without adding significantly to the information that large business already provides to HMRC in their tax returns and as part of their general interaction with HMRC. At the same time the proposal offers only a modest estimated yield even in the medium term; put simply there is no proof that the proposed measure is 'worth it' when comparing yield with additional compliance costs.

The Keith Committee Proposal

(17) The issue of reporting "uncertain" tax treatments is not entirely new. In 1983 the Keith Committee proposed (§7.3.6) that tax returns should include the following question:

> "In making this return have you taken the benefit of any doubt about whether any item ought to be declared, or any relief or deduction allowed? If so, give brief details."

(18) The Keith Committee recognised almost immediately that this was not an appropriate proposal. It was made in the context of Chapter 7 of the Committee's Report addressing complex tax avoidance schemes. The Committee's underlying thought was that taxpayers should make full disclosure. They returned to the subject in Volume 3 of their Report, when they said this of their proposal (§30.4.21):

> "The objective which we have in view is to secure that the taxpayer makes the fullest possible disclosure of all information which is relevant for the purpose of ascertaining his true tax liability."

(19) Much has changed since Keith reported. In particular, nowadays there are the DoTAS rules (amongst many others) to ensure early disclosure of tax avoidance arrangements of various sorts. Furthermore, what Keith was concerned with was proper disclosure of the facts. Criticism of Keith's "benefit of the doubt" proposal never disputed the idea that taxpayers should make full and frank disclosure of all material facts. However, as Keith recognised in reappraising (and abandoning) its proposal, completely different considerations arise in assessing whether there is a doubt as to the way in which a particular set of fully disclosed facts are properly taxed.

(20) One of the particular criticisms that was made of Keith's proposal was that taxpayers were effectively being asked to do the Revenue's work for them. That may appear to be the essential nature of the current proposal nearly 40 years later: to identify particular issues into which HMRC may wish to enquire and litigate. We are not suggesting that it is wrong for taxpayers' compliance obligations to be directed at assisting HMRC in fulfilling their function of collecting the correct amount of tax. Nevertheless, as Keith recognised, it is not easy to construct a proposal that effectively asks taxpayers to 'self-incriminate' and invite potentially time-consuming and costly enquiries from the Revenue.

(21) As we have previously noted, however, the Consultative Document is unclear as to whether the notification proposal is aimed at:

- providing *earlier* disclosure of uncertain tax treatments, as was the aim with the DoTAS measures, and, if so, in what way HMRC will benefit from earlier disclosure as compared to the disclosure that would ordinarily occur in their ordinary interactions with large business or in exercising their existing powers to enquire into tax returns or otherwise examine large business' compliance; or

- identifying situations in which large business under-report their tax liabilities as a result of an uncertain tax treatment going undetected and, if so, in what way a notification proposal aimed at all large business will bring such situations to light rather than just imposing large compliance costs to reveal uncertain tax treatments that would come to light in any event.

(22) In contrast to 1983, in 2020 taxpayers self-assess, so in that sense they already do HMRC's work. It might be suggested that this changes the dynamic of the proposal, as compared to the Keith Committee's 'benefit of the doubt' proposal. The 1983 direct tax system was based on the notion that an inspector of taxes would examine a person's return and any information provided by the taxpayer and, based on that, would decide what tax should correctly be assessed. Full and frank disclosure of the facts was therefore critical to the inspector's ability to assess tax correctly.

(23) Nowadays, taxpayers are required to reach their own view of the correct tax that should be assessed and, in doing so, may need to resolve any doubt in deciding how to self-assess. Indeed, if there is a doubt or uncertainty as to the correct tax treatment, a taxpayer is bound to resolve that doubt in self-assessing and necessarily do so in its favour unless it is prepared to volunteer tax that may not actually be lawfully due.

(24) A necessary feature of any self-assessment regime, therefore, is for HMRC to have the power to investigate the basis upon which taxpayers have resolved uncertain tax treatments. This is the basis of HMRC's current powers of enquiry and investigation and any addition to those powers – such as that currently proposed – must necessarily be placed in the context of the existing powers and compliance obligations and the perceived gaps or inadequacies in those powers. It is notable, however, that the consultative Document makes no attempt to do so.

(25) Thus, where a taxpayer has had to resolve some uncertainty in reporting and paying tax, and has resolved that uncertainty in its favour, it will then need to consider what additional disclosure it should make, in particular to minimise the risk of incurring a penalty for an incorrect or careless return. HMRC for their part can always enquire into a return and have extensive powers to investigate the company's compliance (which, for large companies, can be detailed and frequently take years to complete). One of HMRC's aims with this proposal may be to ensure that it is better informed as to where the taxpayer has taken the benefit of the doubt in making its self-assessment or otherwise complying with its obligation to pay tax (and yet has made no specific disclosure); in other words, notification that there is something that merits enquiry or investigation and some idea of where to look as a result, especially in a case where the taxpayer has not otherwise drawn it to HMRC's attention.

(26) The company's failure to disclose the situation in question may have been deliberate or inadvertent. It is difficult to see how a notification requirement can impact an inadvertent failure, i.e. where the taxpayer has failed to recognise that there is any uncertainty to which it needs to draw attention. HMRC may calculate, however, that the risk that taxpayers may face a penalty for failure to notify the existence of some uncertainty might be expected to lead taxpayers to consider more carefully the possible existence of an uncertainty.

(27) As this suggests, this necessitates that the taxpayer should have recognised that there are two (or more) ways in which particular transactions or arrangements might be taxed, so that the obligation to drawn attention to it arises. This runs into one of the criticisms that was made of the Keith proposal; put starkly, one person's doubt may be another's certainty and vice versa. And, of course, the more thought that is given to an issue and the better informed or more expert

a person may be, the more difficult it may be to answer that question without recognising some uncertainty, so the less thought that is given to it, the easier it becomes to resolve the matter.

(28) As the Keith Committee recognised, trying to think through how to resolve those issues soon runs into the intractable problem of identifying the appropriate level of doubt or uncertainty that must attach to a particular situation and the variety of views that may be held on the matter. The tax system has definitely not become more certain since 1983. An objection to the use of published Revenue practice as a determinant of the duty to disclose is that it effectively allows HMRC to determine the scope of the obligation, backed by a penalty that does not depend upon HMRC being able to show that they are right.

(29) A significant proportion of the issues that arise in an enquiry into a tax return or some other examination of the company's compliance record stem from some uncertainty as to the correct treatment to be accorded to a payment, transaction or arrangement. Every technical issue that is litigated can be classified as arising from an uncertain tax treatment. Indeed, HMRC itself has an established matrix that it uses to assess its prospects of success in litigation and that seeks to evaluate the potential outcome in terms of the level of certainty or uncertainty that attaches to the position that HMRC is taking in the litigation. In that respect, the proposal effectively requires a company to anticipate HMRC's own assessment of the level of uncertainty involved.

(30) Where an issue of substantive tax liability is litigated, the question whether a taxpayer is also at risk of a penalty (in addition to the tax) for the way in which it has reported a transaction or arrangement and paid tax, ordinarily depends upon HMRC successfully establishing a liability to pay the tax. In this case, an obligation to notify will arise for any substantive issue that HMRC might litigate or does in fact litigate, unless the issue falls within a specific exclusion from notification. The penalty in that case will attach to the company's failure to anticipate the possibility of litigation, irrespective of whether or not HMRC would be or are successful in that litigation.

The Stated Policy Objective

(31) Paragraph 1.2 of the Consultative Document states that;

> "The proposal is designed to improve HMRC's ability to identify issues where businesses have adopted a different legal interpretation to HMRC's view. This requirement will help to reduce tax losses caused by businesses adopting tax treatments that do not stand up to legal scrutiny." (Emphasis added)

(32) This is elaborated in paragraphs 3.1 and 3.2 of the Consultative Document, as follows:

> "3.1 The objective of this policy is to provide HMRC with timely and accurate information regarding the tax treatments adopted by large businesses which HMRC may disagree with. This information is sought to better and more quickly address legal interpretation issues.
>
> 3.2 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."

(33) These paragraphs therefore suggest that the policy objective of the proposal is:

- to enable HMRC to identify more easily and quickly situations in which HMRC may wish to challenge the interpretation of the law that underlies the way in which large business has reported and paid tax, and

- in doing so, to reduce the 'legal interpretation' tax gap.

(34) The Consultative Document sets out the Tax Gap definition of 'legal interpretation' in paragraph 3.3 but does not attempt to analyse the proposal in terms of its impact on the legal interpretation tax gap. The total tax gap for the year 2018-19 is estimated at £31 billion or 4.7 per cent of total theoretical tax liabilities.[1] Sixteen per cent (or £4.9 billion) of that total tax gap is estimated to be attributable to legal interpretation. By customer grouping, 17 per cent (or £5.3 billion) of the tax gap is estimated to be attributable to large business. It does not seem possible, however, to identify from the Tax Gap figures the extent to which the 'legal interpretation' tax gap is estimated to be attributable to contestable legal interpretation by large business. The Consultative Document itself offers no such estimate by reference to which its proposal can be evaluated.

(35) The latest Tax gap figures indicate that the employers' tax gap for PAYE is estimated at 1 per cent of total theoretical liabilities (£3 billion), of which £1.6 billion is estimated to relate to large employer PAYE liabilities. The corporation tax gap for large businesses in 2018-19 is estimated at £0.9 billion and has shown a downward trend from 8.7 per cent of total CT liabilities in 2005-06 to the current estimate of 2.8 per cent.

(36) As to the methodology that underlies the estimation of the CT tax gap for large business, HMRC explain as follows:

> "Estimates of the large business CT gap come from information on our case management system where tax specialists record the yield collected against risks identified and investigated. The large business case management system allows the classification of risks into several categories, including avoidance, genuine errors, omissions from the company's tax return, and instances where there is genuine uncertainty about the correct tax treatment. The avoidance category relates to the use of disclosed avoidance and other suspected avoidance identified by our tax experts.
>
> Identified risks can take many years to resolve. For open enquiries, it is necessary to forecast the expected compliance yield to calculate the tax gap. Differences between the forecast yield and the actual yield may lead to revised tax gap estimates in subsequent publications. The tax gap for more recent years is likely to be subject to larger revisions because a higher proportion of compliance yield is estimated.
>
> Risks may also take a number of years to identify and this is significant in the data for CT for more recent accounting periods. The use of projected data for these years ensures the chance of large revisions to these years is minimised.
>
> … Risks can also be identified and not lead to any tax being found to be due if the taxpayer is deemed to be compliant, meaning the risk will have been settled without any additional tax due. These are still included in our model as they are an important contribution to the overall picture of (non)-compliance in the population.
>
> The Large Business directorate reports compliance yield on a year of settlement basis, whereas the tax gap estimates are based on a financial year accounting basis. For tax gap purposes only, compliance yield is calculated as the total yield from closed

[1] HMRC, Measuring Tax Gaps 2020 Edition, Tax Gap Estimates for 2018 to 2019. The 'theoretical tax liability' represents the tax that would be paid if all individuals, businesses and companies complied with both the letter of the law and HMRC's interpretation of Parliament's intention in setting law (i.e. the 'spirit of the law')

avoidance or litigated technical risks relating to that accounting period plus the estimated compliance yield from open avoidance risks and technical risks in litigation."

(37) Evidently, a multiplier (based on US research involving the IRS) is used to allow for non-detected non-compliance. The estimated tax gap for large business (certainly in relation to corporation tax liabilities), however, does not appear to be based on HMRC's assessment of issues that entirely escape their notice. Rather it depends largely upon detected occasions of avoidance, differences in legal interpretation, failure to take reasonable care and evasion or non-payment.

(38) In addition, on the basis that the present proposal is targeted at 'legal interpretation', we assume that situations involving avoidance, failure to take reasonable care, error and evasion or non-payment are not intended to be within the scope of the proposal. This is because those situations are already covered by other measures.

(39) Finally, the Consultative Document itself suggests that the proposal has a relatively modest Exchequer impact, such that by 2024-25 the impact of this measure is only estimated at £45 million. While any amount of additional tax may be thought to be welcome, the Consultative Document offers no explanation of the basis of that estimate or the relative costs of the acknowledged compliance and administrative burden of the measure that will be involved for large business or HMRC.

Implementing the Stated Policy Objective

(40) The stated policy objective suggests two principal criteria by reference to which it should be implemented:

- First, in complying with its various tax obligations, the business concerned should "*have adopted a different interpretation of the law to HMRC's view of the law*", and
- The business' interpretation of the law "*should not stand up to legal scrutiny*".

(41) These criteria require that:

- HMRC's view of the law must be clearly and publicly stated, whether or not it may eventually be found to be correct, and
- It must be possible to make some appropriate assessment of the business's view of the law relative to HMRC's view of the law to suggest that it is at least more likely than not that HMRC's view of the law will prevail, if tested in court.

(42) As regards these criteria and what they involve:

- We see no objection to the idea that HMRC should be entitled to state its view of the law, even if that view may ultimately be shown to be wrong. HMRC already publishes a substantial amount of material setting out its view of the law and the manner in which it believes that the law should be implemented or applied in specific situations. That seems to us both a necessary and proper aspect of the administration of any tax system. While there is always scope for improving HMRC guidance and the manner and form in which it is published and communicated, we do not consider that this necessarily amounts to giving HMRC the right to 'make law', provided that there is a properly functioning tax appeals system enabling taxpayers to challenge HMRC's view, whenever and however it is expressed.

- We have reservations, however, with the statement that the notification proposal will allow "*HMRC to focus on clarifying these areas of uncertainty*" (see paragraph 3.2 of the Consultative Document, at (32) above). We can see that one function of a notification requirement might be to bring to light situations not previously envisaged in which the application of the current legal rules is uncertain. It should be clear, however, that it is primarily Parliament's role to resolve the uncertainties of current legal rules and not HMRC's role to do so merely by publishing guidance.

- The only way in which HMRC can legitimately "*clarify an area of uncertainty*" is by asking the Government to legislate. If "*clarifying these areas of uncertainty*" envisages publishing material that sets out HMRC's view of the law, that action may affect companies' compliance obligations by making a contrary view notifiable. However, it cannot affect the legal position if, as HMRC accept is possible, they have got it wrong.

- We think these consideration illustrate the essential 'Catch-22' involved in the proposal: if HMRC has stated that its view of the law is X and the taxpayer disagrees (and put their return in accordingly) the disagreement will be clear and there is nothing for HMRC to clarify. It will be for the Courts to clarify the law. If HMRC has not stated its view of the law in a particular area, how does the taxpayer know that they are disagreeing with HMRC's (unpublished) view?

- Next, the requirement that the business should have adopted a different legal interpretation of the tax rules to the published view of HMRC suggests that the business should consciously and deliberately have adopted a particular view of the law (contrary to HMRC's view). The mere fact that the business has reported and/or paid tax on a different basis would suggest that the notification requirement would substantially overlap with errors and a failure to take reasonable care, in respect of which different considerations and penalty regimes apply.

- This raises the question as to how the notification proposal interacts with existing reporting obligations. The fact that the notification proposal is intended to extend to a variety of different taxes with widely different reporting and compliance obligations makes it particularly challenging to devise a satisfactory measure (and indeed, we understand, that this is an aspect of the proposal which is being reconsidered). So far as corporation tax is concerned, however, the issue arises as to whether a company already has an obligation to draw attention to any aspect of their return where it has chosen to adopt a different view of the law to the HMRC's publicly stated view of the law and to report and pay tax on that different basis.

- In cases where a reporting obligation may already exist, for example on filing a corporation tax return, it is not entirely clear what a prior notification proposal actually achieves. Notification does not advance the time at which HMRC is entitled to enquire into a return and therefore seems to achieve little in addressing the tax gap on legal interpretation. In the case of tax avoidance arrangements, an objective of the DoTAS regime was to enable HMRC to identify avoidance schemes at a much earlier stage to prevent the proliferation of their use before the Government and Parliament could react to them. We do not believe that the same considerations apply in this case. The principal objective of the notification requirement seems likely to be for HMRC to identify situations where enquiry is needed and, if necessary, the

company's view can be challenged on appeal. We think the majority of such cases are likely to be 'bespoke' applications of the tax rules to the company's particular circumstances and therefore rarely involving a need for an urgent or immediate change in the law or even the immediate publication of Revenue guidance. In any event, if such is the objective of the notification requirement, it would suggest the need for the company to file sufficient details of the uncertainty in question to enable HMRC to assess it properly prior to commencing an enquiry into the company's return. In relation to a company tax return, it also begs the question as to the timing of any notification if, for example, the company its particular view of the law is formulating in preparing its return and only crystallises on its submission (at any time prior to which it is, of course, entitled to change its mind). These points have significant implications for both large companies (in terms of their compliance obligations) and HMRC (in terms of the administrative burden in dealing with notifications).

HMRC's Proposals for Implementation

Uncertain tax treatments

(43) Paragraph 3.5 of the Consultative Document suggests that the aim is to frame "*an objective requirement to notify*" and draw upon existing definitions and requirements that will be familiar to large business and their advisers. The test articulated in paragraph 2.6 of the Consultative Document appears at odds with this. It suggests that an "uncertain tax treatment" is one:

> "where the business believes that HMRC may not agree with their interpretation of the legislation, case law, or guidance."

(44) This prompts some obvious comments:

- It seems unlikely that any statutory obligation to notify should be framed in terms of the taxpayer's 'belief'. As we have noted, this would offer a perverse incentive for taxpayers to avoid enquiring into HMRC's view of the law. We have therefore assumed that the principle requirement would be that the company should have adopted an interpretation of the law that is at variance with HMRC's stated view of the law.

- Tax legislation incorporates vast areas of uncertainty. Tax advisers spend their lives advising taxpayers on areas of uncertainty. For the most part this has nothing to do with tax planning but is merely designed to ensure that commercial transactions and arrangements are undertaken with 'predictable' (or reasonably assessed) tax consequences and that those transactions, etc., are properly reported for tax purposes.

- The fact that the interpretation of tax law or its application to a particular fact pattern is uncertain pre-supposes that there may be at least two (and sometimes several) possible answers. That does not mean that it will be known that HMRC will disagree with the interpretation or application that the adviser in question believes is the correct interpretation or application of the law. If a company believes that the advice it has received is correct in law, it must surely be entitled to assume that this will be the interpretation or application of the law that HMRC will adopt. The presumption must be that HMRC can only tax in accordance with the law. On the other hand, if the

test is merely that HMRC *may* disagree on the matter, what level of doubt must the company think exists for the situation to become notifiable?

(45) HMRC recognise that the definition of a 'legal interpretation' for the purposes of tax gap measures "*covers a broad and complex range of underlying issues*" (Consultative Document, paragraph 3.4). As the Consultative Document goes on to note:

> "In some cases there may be a range of different results, all of which would be consistent with the law; others will hinge on the application of legal principles to circumstances that are highly fact-, and/or case-specific (such as for the accounting treatment of a transaction or VAT partial exemption). In some cases the customer may be making a judgment from a position of genuine uncertainty, whilst in others the customer may be taking a position with a deliberate intention of pushing the boundaries of the law to their advantage."

(46) While we recognise all of these situations, the issues that they raise are significantly mitigated if each of the situations has to be measured against clear, published HMRC guidance. Thus, there may be many situations in which there are a range of different results, all of which would be consistent with the law. If, however, HMRC has published its view of what it considers the law requires, the only issue that a taxpayer has to consider before adopting a different view of the law is whether it is bound to notify because HMRC's view would be more likely than not to prevail if tested on an appeal.

(47) If there is genuine uncertainty as to the application of the law to a particular transaction or set of circumstances, and the company forms its own view of what the law requires (in the absence of any published view by HMRC), it is difficult to see the objection in its doing so: certainly in terms of the stated policy objective of the notification proposal.

(48) The question arises, however, as to whether a notification proposal could operate in the absence of clear, published HMRC guidance. In particular, as the definition recognises, there may be occasions on which the taxpayer, "*may be taking a position with a deliberate intention of pushing the boundaries of the law to their advantage*".

(49) In considering this question, we recognise that this proposal is not designed to deal with avoidance transactions that are already subject to the DoTAS rules. As we note below, however, this does not necessarily mean that anti-avoidance legislation is outside the scope of the proposal. Nevertheless, the situations with which we are concerned is, effectively, every situation not covered by the DoTAS notification rules where there is some uncertainty as to how tax rules apply to that situation.

(50) It hardly needs stating that the tax system is riddled with uncertainties: indeed, legislative action in recent years in many areas has functioned to *increase* the level of uncertainty that businesses face in complying with tax rules. This is when it is acknowledged that the objective should be to reduce uncertainty, which is the leading cause of complexity. Three broad areas of uncertainty will serve to illustrate where uncertainty abounds and where the requirement to notify would need to be considered:

- First, many of these uncertainties surround the hundreds (literally) of anti-avoidance rules – specific, targeted, regime applicable and general – that Parliament has enacted in recent years. Companies must regularly assess whether HMRC might or might not agree that the company's particular aims or purposes or the manner and effect of

implementing its commercial transactions do or do not fall within the scope of such rules. In every case, however, a conclusion that the company's actions do not fall foul of any such anti-avoidance rules may inevitably involve some uncertainty as to whether HMRC might take a different view of the matter. The fact that the notification proposal is not proposed to extend to anything involving tax avoidance is irrelevant to such consideration because the company will have formed the view that its actions have no tax avoidance purpose or effect. There may nevertheless be an uncertainty that as to whether HMRC might take a different view given the general nature of most tax avoidance rules, in which case the tax result would be different.

- Another inevitable area of uncertainty surrounds transactions that are potentially reviewable under arm's length transfer pricing rules. This is particularly relevant to large companies that are part of an international group. Given that arm's length transfer pricing rules rarely admit of a single, clear answer, rather than a range of pricing options and outcomes, there is bound to be an element of uncertainty surrounding the application of those rules. In the absence of clear HMRC published guidance on the application of those rules in specific cases, it is difficult to see on what basis a sensible notification requirement could operate, other than potentially in respect of every transaction within the scope of such rules.

- A third area concerns the question whether particular receipts or expenditure count as revenue or capital in nature. Over the years, hundreds (literally) of cases have considered this issue and judicial dicta abound to illustrate the difficulty of predicting the outcome of any particular difference of view between HMRC and taxpayers. Three examples will serve to illustrate this point:

  > "It may be possible to reconcile all the decisions, but it is certainly not possible to reconcile all the reasons given for them. … The question [whether a particular outlay can be set against income or must be regarded as a capital outlay] is ultimately a question of law for the court, but it is a question which must be answered in light of all the circumstances which it is reasonable to take into account, and the weight which must be given to a particular circumstance in a particular case must depend rather on common sense than on strict application of any single legal principle." (Lord Reid in *Strick v Regent Oil*)
  >
  > "It is a question of fact and degree and above all judicial common sense in all the circumstances of the case, and, while no one regrets it more than I, I do not believe it is possible to lay down any principle, when dealing with trading contracts, which would be of any guidance alike to Crown and subject in future cases." (Lord Upjohn in *Strick*)
  >
  > "The forensic field of conflict involved in this appeal is an intellectual minefield in which the principles are elusive … analogies are treacherous … precedents appear to be vague signposts pointing in different directions … and the direction finder is said to be 'judicial common sense' … The practice of judicial common sense is difficult in revenue cases." (Templeman J in *Tucker v Granada Motorway Services*)

These are, however, no more than illustrations. The all-encompassing approach of this proposal involving the entire tax statute subject only to specified exceptions and without reference to specific, published Revenue views seems especially problematic for companies' compliance. Indeed, a limitation to published Revenue views raises its own issues given the scale of HMRC's published material, its variety of sources and the ability to add to and amend it over time.

(51) The Consultative Document is unclear on the criteria that are proposed to be adopted to identify an uncertain tax treatment; in other words, what level of uncertainty amounts to 'uncertainty' for these purposes. Paragraph §3.5 says that, "*it is not the intention of this policy to consider or differentiate between these underlying issues and differing drivers*". We do not find this statement especially clear but we assume that Consultative Document is suggesting that the notification rules will not seek to differentiate how the uncertainty arises; for example, whether it arises in the 'natural' course of events from uncertain legislation or uncertainty over its application or because the company concerned is 'pushing the boundaries of the law to their advantage'.

(52) Paragraph 3.5 of the Consultative Document suggests that the intention will be to frame "*an objective requirement to notify*" and draw upon existing definitions and requirements that will be familiar to large business and their advisers. Consultative Document §3.6 then suggests that it will draw upon IFRIC 23 *Uncertainty over Income Tax Treatments*, before continuing at Consultative Document §3.7:

> "IFRIC 23 requires an assessment of whether it is probable that a tax authority (including a court) would accept an uncertain tax treatment. It therefore looks to the ultimate outcome, and not solely the likelihood of challenge by HMRC. This measure differs in this respect as it proposes an assessment, not of the ultimate outcome, but to identify and notify uncertainties that *HMRC is likely to challenge*." (Emphasis added)

(53) This qualification chimes with the test articulated in paragraph 2.6 of the Consultative Document but seems to us unacceptable as a proposal for a notification requirement to which it is proposed to attach a penalty. It raises three obvious questions:

- How are taxpayers supposed to know what HMRC are likely to challenge?
- What level of challenge does it require within HMRC – something that it is possible that an officer might decide to challenge (and, if so, any officer or only an officer with particular knowledge or expertise?) or something that any officer is bound to challenge because it is a known "HMRC's view"?
- What exactly is involved in a "challenge" – the opening of an enquiry generally into a return or filing or the opening of an enquiry or pursuit of an investigation specific to the 'uncertainty' in question or the issue of a closure notice, determination or assessment correcting the return or filing in this respect?

(54) The threshold for IFRIC 23 is "*probable*", which is defined as "*more likely than not*". The Consultative Document does not refer specifically to this aspect of IFRIC 23. Thus, in defining uncertainty for IFRIC 23, an entity need only consider whether a particular tax treatment is probable, rather than highly likely or certain, to be accepted by the taxation authorities. If the entity concludes that it is probable that the taxation authority will accept an uncertain tax treatment, the entity can determine the relevant tax position consistently with the tax treatment used or planned to be used in its tax filings. This highlights the following question:

- Is the question whether HMRC is [more] likely [than not] to challenge or is it whether HMRC is [more] likely [than not] *not* to challenge?

(55) Consultative Document §3.9 says that three IFRIC 23 principles will apply to the requirement to notify. These are:

- Whether an entity considers uncertain tax treatments separately:

  This is a key aspect of IFRIC 23 involving the determination of the "unit of account". Thus, IFRIC 23 says that, "*An entity shall determine whether to consider each uncertain tax treatment separately or together with one or more other uncertain tax treatments based on which approach better predicts the resolution of the uncertainty*". In the context of an accounting principle that seeks to assess the ultimate outcome of the uncertainty, this principle has some meaning. In the context of one that asks whether HMRC are likely to challenge an uncertain tax treatment, it is difficult to understand what the Consultative Document has in mind.

- The assumptions an entity makes about the examination of tax treatments by HMRC

  IFRIC 23 requires an entity to assume that the taxation authority can and will examine amounts it has the right to examine and have full knowledge of all related information when making those examinations. This seems a relatively straightforward and obvious principle to apply in assessing whether HMRC is likely to challenge a particular uncertain tax treatment (and would be the case irrespective of whatever principle IFRIC 23 adopted). It does not resolve, however, either of the questions posed at paragraph (53) above.

- How an entity considers changes in facts and circumstances, and perhaps even subsequent case law

  IFRIC 23 requires an entity to reassess its judgments and estimates if the facts and circumstances on which the judgment or estimate was based change or new information that affects the judgment or estimate becomes available. The application of this principle would suggest that the notification obligation is on-going in the sense that a company would be bound to notify an uncertain tax treatment if it later became aware, for example, that HMRC was pursuing a particular point on appeal to the Tribunal or HMRC subsequently published 'guidance' of some sort that contradicted the position adopted by the company concerned.

  Although the Consultative Document says that this IFRIC 23 principle will apply, Consultative Document §3.10 immediately appears to suggest a different approach, as follows:

  "Regarding the last point, it is proposed that the decision is made about whether a tax treatment is uncertain at the time they are required to submit a notification. If a tax treatment becomes uncertain after that date (perhaps due to changes in case law) there would not be an expectation to revisit that year. However, if the tax treatment is ongoing, then a notification would be required in the subsequent year."

(56) Overall, we have concluded that IFRIC 23 has little relevance to the proposal being put forward in the Consultative Document; hence our suggestion that the Consultative Document is essentially paying lip-service to IFRIC 23. The relevance of IFRIC 23 to the notification proposal depends fundamentally upon resolving the real aim and rationale of the proposal which, as we have noted, is the essential weakness of the Consultative Document.

The Consultative Document Questions

(57) The following paragraphs list the Consultative Document questions and our comments on them. The answers should be read subject to our previous comments in this response.

Question 1: Do you think the suggested threshold criteria are suitable for the requirement to notify?

(58) We note the proposal that the threshold criteria are set so that the notification proposal applies only to those companies, LLPs and partnerships that are already within the scope of the SAO regime or the publication of tax strategies regime. In so far as there is to be a new compliance obligation placed upon business, it seems sensible to avoid creating an entirely new category and instead to base the measure on an existing 'identified' group of businesses.

(59) However, we do not regard the threshold criteria as the real issue. It is whether the notification proposal is a sensible and proportionate further compliance obligation to place upon such businesses. The notification proposal is unrelated to either the SAO regime or the publication of tax strategies regime and therefore represents an entirely new compliance obligation for such taxpayers rather than one that derives from or is a development of either of such regimes.

(60) The majority of large companies will already have a customer compliance manager and be within the scope of existing compliance initiatives, such as the Business Risk Review. As we have previously noted, we are surprised that the Consultative Document makes no attempt to place its notification proposal within the context of such initiatives.

(61) As currently proposed, it is not possible to conclude that it is a sensible, proportionate or necessary additional compliance obligation to impose on any business, whether large or small. In particular, we doubt that a single notification requirement can be sensibly or practically applied across the board to all the taxes listed in paragraph 2.11 of the Consultative Document. The proposal needs to address the particular issues and administrative and compliance regimes for the particular tax. It seems unlikely that the same considerations (let alone a common reporting requirement) could sensibly apply to VAT, PAYE (encompassing both income tax and NICs) and corporation tax.

(62) So far as corporation tax liabilities are concerned, many of the issues that could fall within the notification proposal may already be covered in the company's CT return and will emerge from routinely opened enquiries into the return. This naturally calls into question the basis for imposing a further compliance obligation to deal with matters that are already reported or which emerge from the exercise of existing powers. If a further compliance obligation of this nature is thought to be required, it would seem far more efficient to require taxpayers to indicate in their tax returns where they have taken advantage of some uncertainty.

(63) That obligation essentially exists in cases where a clearance (formal or informal) has been sought and refused. The sanction for failure to do so is in terms of potential penalties if further tax is found to be due. Here the penalty seems to arise from the failure to notify, whether or not any further tax is due.

Question 2: Do you think there are any other areas that should be excluded from the notification regime?

(64) The exceptions illustrate that these proposals are not concerned with avoidance or similar types of behaviour that are open to criticism but are concerned with the computation and reporting of ordinary tax liabilities in circumstance in which the interpretation and / or application of tax law is unclear or uncertain. Regrettably, this is all too often the case and, indeed, governments have in many cases chosen to draw boundaries in an uncertain and vague way which HMRC then supplement with 'guidance' in one form or another. The only appropriate arbiters of such uncertainty are the tribunals and courts and it should not be the case that a taxpayer faces a penalty solely for disagreeing with HMRC's view of the law or its application to a particular situation, and choosing to challenge that view on appeal. .

(65) The central problem here lies not in identifying exceptions but in moving away from a proposal that is formulated in an 'all-encompassing' form (subject only to identified exceptions) and, instead, identifying the specific compliance issues that larger companies have been shown to involve, notwithstanding the existence of current co-operative compliance initiative, and devising a properly targeted measure that is appropriately integrated with and takes account of existing reporting and compliance requirements.

Question 3: Do you think the definition and principles in IFRIC 23 are appropriate to be used for the requirement to notify?

(66) Possibly, but it is difficult to see in what way IFRIC 23 is actually proposed to adopted as a basis for this notification proposal. The Consultative Document pays lip service to an existing accounting requirement while proposing something that is really rather different in scope and effect. If the notification regime were in fact to be based on IFRIC 23, accounting and notification would at least be in harmony and there might be less cause for concern at what is proposed. That is not, however, presently the case. In any event, resort to IFRIC 23 does not alter the need for any notification proposal to take account of existing reporting and compliance requirements and to be properly integrated with those existing requirements. Once that is done, it may be that IFRIC 23 will appear a rather less suitable precedent.

Question 4: Do you think there would be any problems with the person considering whether notification is required, being different to the SAO?

(67) It is difficult to see why it is necessary for the SAO to be the designated person for a notification regime to achieve its purpose. If the aim is to ensure that there is someone of appropriate seniority in the organisation to review the approach that is being adopted in relation to tax returns, etc., even where no avoidance is involved, then that might be a legitimate line to take. However, it necessitates ensuring that the scope of the notification obligation is drawn in a manner that limits its operation to the type of case and occasion where such senior scrutiny is merited. In any event, we understand that HMRC's thinking has moved away from linking the proposal to the SAO regime.

Question 5: Do you think the proposed de minimis threshold of £1m is reasonable for the notification of uncertain tax treatment?

(68) We think that this threshold is low for the type of company involved, even if what were proposed was a case by case de minimis limit. As a de minimis limit that is cumulative, transactions or arrangements of any size will necessarily be brought within the scope of the notification regime. There is no issue here of 'splitting' transactions to come within a *de minimis* threshold. Given the variety of taxes to which the notification proposal is intended to apply, the present de minimis proposal scarcely seems a practical one or a proposal that would have any serious impact on large

companies' compliance obligations. A better targeted and well thought through proposal that takes account of existing reporting and compliance requirements may allow a more practical proposal to emerge.

Question 6: Do you believe there are strong arguments for a materiality threshold?

(69) Materiality would at least seem a more sensible starting point for consideration. A materiality threshold would not, however, by itself resolve the serious issues raised by the current proposal. An issue with a materiality threshold is – whose view of materiality? It is an inherently subjective notion, opening the possibility of HMRC and the taxpayer disagreeing on whether something is material.

Question 7: Do you envisage problems determining the £1m threshold for indirect taxes, particularly VAT?

(70) This question really raises the question whether this proposal is in fact a sensible proposal for each of the taxes that are listed to be covered by the notification regime. Are those objectives achieved by a single proposal with a single de minimis limit or better achieved by a measure targeted at the tax involved and taking account of the specific reporting and compliance obligations for that tax? What exactly is the proposal designed to achieve in each of those cases?

Question 8: If so, can you suggest how these problems could be mitigated?

(71) Please see our answer to Question 7. There should be clarity as to the objective sought to be achieved by notification followed by a proposal that is properly targeted at that objective taking account of existing reporting and compliance obligations.

Question 9: Do you consider that it would be beneficial to supplement the main requirement with a specific list of indicators of uncertainty?

(72) Given that an essential element of the regime must surely be some knowledge of HMRC's view of the law (even if it is wrong), clarity on that issue seems an absolute pre-requisite. If the notification regime is really targeted at cases where the taxpayer is adopting a tax treatment that "*does not stand up to legal scrutiny*" in the courts, specific HMRC guidance on 'uncertainty' may not be needed. Indeed, the idea of a list of indicators of uncertainty may be undesirable. A list may merely offer scope for further argument on the level of uncertainty that must be demonstrated for the obligation to notify to arise: uncertainty will be piled on uncertainty as Pelion on Ossa. In fact, this question merely highlights the fact that the proposal has nothing to do with "legal scrutiny" but is really concerned with "HMRC scrutiny" even in cases where HMRC's view of the law may be wrong.

(73) There can perhaps be no real objection to a requirement that taxpayers draw attention to situations in which their returns, etc., adopt a position that is contrary to a known HMRC view of the law. The proposal, however, essentially requires taxpayers to assess whether HMRC might want to take a different view of the law, notwithstanding that taxpayers are advised that their returns are correct. What is really needed, therefore, is not Revenue guidance on what is uncertain in current legislation – large companies are likely to need little guidance about that – but clear and definitive guidance on HMRC's view of the law, so that taxpayers can report their transactions in the knowledge of whether they are taking a contrary view.

(74) That would still leave unanswered whether the inadvertent adoption of a particular position can give rise to a failure to notify if in due course HMRC take a different view on how the transaction or arrangement should have been taxed and whether HMRC's decision to litigate may in itself

evidence a situation that should have been subject to notification (and therefore liability to a penalty irrespective of the litigation outcome).

(75) However those questions are resolved, any test of 'uncertainty' that is set must be one that is capable of judicial determination on an appeal against a penalty for failure to notify. That will set the minimum requirement for any proposal. A test of 'uncertainty' that is not open to judicial scrutiny and determination is plainly unacceptable as effectively imposing an unappealable penalty for failure to notify.

Question 10: Do you agree with the proposed examples, and do you have any others which you consider would be helpful?

(76) See our answer to Question 9.

Question 11: Do you think the SAO certification process is appropriate for the notification requirement?

(77) This again raises the issue of the proposal's real objective. If it is to heighten awareness at a senior level in the organisation to occasions where the taxpayer is adopting an approach that does not "*stand up to legal scrutiny*" and therefor ensure that the taxpayer only adopts 'safe' positions or otherwise notifies, the SAO process might be appropriate.

(78) Given the way in which the proposal is currently cast, however, it is difficult to see why the SAO certification process is an appropriate one to adopt or, indeed, would be capable of practical operation.

Question 12: Would reporting VAT and PAYE issues occurring in the tax year, rather than in the accounting period for the company, cause any significant difficulties?

(79) As we have already indicated, we consider that the issues of particular taxes are better addressed by measures targeted at that tax.

Question 13: What alternative person could be responsible to make the notification for large partnerships?

(80) Depending on the objective, presumably someone appropriately senior within the partnership organisation, possibly "the responsible partner" or similar senior person.

Question 14: Alternatively, what process (other than SAO) could be used for a single, annual notification?

(81) This depends upon the real objectives of the proposal. The obvious alternative process would be the return, etc., that has to be made and the obligation in that return, etc., to draw attention to those situations in which the taxpayer has adopted a particular tax position in an areas of uncertainty and where it can reasonably be assessed that HMRC might take a different view.

Question 15: For each relevant tax, what information do you think could be reasonably provided as part of the notification requirement, in addition to a concise description and indication of amount?

(82) This goes back to the confused objectives of the proposal. Given that notification may well be made before a return, etc., is required to be made, and therefore before the taxpayer may even have addressed the question of how it should be reported, it is quite difficult to see what information should reasonably be provided. This is a further illustration of the inadequate thought that has gone into this proposal.

Question 16: Do you think there are any common disputes, that due to the complex nature of such disputes, where specific documents or information could be provided alongside the notification?

(83) See answer to Question 15.

Question 17: Do you think the principle and quantum of the existing SAO penalty regime is sufficient for the integrity of the notification requirement?

(84) The proposal as currently formulated is not fit for purpose in terms of a penalty because the suggested test of 'uncertainty' is not properly justiciable. It therefore represents an unappealable penalty for disagreeing with HMRC (even when HMRC is wrong) and failing to anticipate HMRC's future action. Broadly speaking, the person concerned (irrespective of who it is) may be liable to a penalty for making a completely correct return, etc., of the taxpayer's tax liability merely because they failed to tell HMRC that there was something in that return with which HMRC might want to take issue even though HMRC's view of the law could be wrong. The imposition of a penalty in such circumstances would be completely objectionable. The minimum requirement is be that the circumstances in which a penalty may be imposed should be properly justiciable by an independent tribunal on appeal.

Question 18: Regarding the penalty in 6.3.2, who do you think should be liable to the penalty, the person liable to notify or the entity, and, if more than one (legal) person, in what circumstances, and in what quantum, would these persons be culpable/liable?

(85) Please see our answer to Question 17.

Question 19: Do you have any comments on the assessment of equality, and other impacts?

(86) The Exchequer impact is minimal as compared with the tax gap at which this is supposed to be aimed and the likely compliance costs of the current proposal that would be imposed on the taxpayers concerned.