HM Revenue & Customs

Notification of uncertain tax treatment by large businesses – second consultation

Consultation document

Publication date: 23 March 2021
Closing date for comments: 1 June 2021

Summary

Subject of this consultation

In March 2020 the government consulted on the proposed requirement for large businesses to notify HMRC where they have adopted an uncertain tax treatment.

Scope of this consultation

This consultation seeks views on the policy design which takes into account responses received to the previous consultation. Particularly we seek views on the:

- definition of uncertain tax treatment,
- threshold for notification,
- exclusions from the requirement to notify, and
- proposed penalty for non-compliance.

Who should read this

We welcome responses, in particular, from large businesses and agents representing large businesses.

Duration

23 March 2021 until 1 June 2021.

Lead official

Adrian Morton, HM Revenue & Customs

How to respond or enquire about this consultation

Level 5
1 Ruskin Square
Croydon
CR0 2LX
uncertaintaxtreatmentconsultation@hmrc.gov.uk

Phone 07816 296155.

Additional ways to be involved

HMRC will be keen to hold or attend meetings with interested parties to discuss these proposals.

After the consultation

The government will publish its response, along with draft clauses, in summer 2021. Legislation will be introduced in the 2021 to 2022 Finance Bill and will take effect from April 2022.

Getting to this stage

This is the second consultation on this proposal and builds on responses to the previous consultation in 2020.

Previous engagement

During the consultation in 2020, the government engaged with businesses within scope of this measure, along with their agents, representative bodies and legal organisations. Since the consultation closed, the government has also had informal discussions with external stakeholders.

Contents

1. Introduction

1.1. The government announced at the March 2020 Budget the intention to provide for a requirement for large businesses to notify HMRC where they have adopted an uncertain tax treatment. A consultation was published on 19 March 2020 and closed on 27 August 2020[1].

1.2. Recognising the concerns raised by respondents to that consultation, in November 2020, it was announced that implementation will be deferred by 12 months to allow officials to respond to those concerns and to engage further with stakeholders. This consultation builds on, and looks to address concerns raised in, the previous consultation.

1.3. Although some of the details of the proposal have changed as a result of feedback to the first consultation, the aim of the proposal remains unchanged: to identify and reduce tax losses caused by delays in identifying and resolving disagreements in how the law should be interpreted.

1.4. This consultation seeks views on the changes to the proposal resulting from responses received to the previous consultation, particularly, the:

- definition of uncertain tax treatment,
- threshold for notification,
- exclusions from the requirement to notify, and
- proposed penalty for non-compliance.

1.5. The government intends that the notification requirement will be legislated in Finance Bill 2021-22 and apply to transactions in returns due to be filed after April 2022.

[1] Notification of uncertain tax treatment by large businesses – consultation, HMRC, March 2020

2. Policy objectives

2.1. The legal interpretation tax gap is estimated to be £4.9bn[2]; 16% of the overall tax gap and the second largest behavioural component. It remains a portion of the tax gap that is difficult to address. HMRC estimates that the majority of the legal interpretation gap arises from disputes between HMRC and large businesses.

2.2. Legal interpretation tax losses arise where HMRC and a customer take a different view of what the law means in a particular case, which results in a different tax outcome, and there is no avoidance. Sometimes, these differences can take years to identify and resolve, often via litigation which is costly for both customers and HMRC. Longstanding legal interpretation disputes cause uncertainty for HMRC and taxpayers and can undermine trust in the tax system. This measure aims to highlight and clarify legal interpretation differences earlier, either through notification, or by encouraging more businesses to discuss areas of uncertainty with HMRC before they submit their returns, thereby negating the requirement to notify.

2.3. This measure is not intended to promote any assumption that HMRC's interpretation is correct, nor that HMRC is a final arbiter of tax law. The measure aims to ensure that HMRC is aware of all cases where a large business has adopted a treatment that is contrary to HMRC's known position and to accelerate the point at which discussions occur on uncertain treatment.

2.4. HMRC's strategic approach is to use the most appropriate, cost-effective, and highest impact way to encourage and support all customers to comply with their obligations. Having accurate and timely information to inform our interventions, and the chance to constructively discuss that information with the customer, significantly increases the speed and efficiency of the intervention; benefitting both HMRC and taxpayer. We impose sanctions for those who do not comply, so that the compliant majority are not disadvantaged.

2.5. HMRC has developed an efficient risk-based approach to dealing with its largest and most complex business customers. The current model of customer compliance management is an approach to dealing with tax matters which looks to provide certainty, clarity, proportionality and speed of resolution, underpinned by high levels of professionalism and commercial understanding.

2.6. Generally, HMRC's relationship with large businesses is positive (86% of large businesses rated their dealings with HMRC as positive in the 2019 survey[3]). Many large businesses currently approach HMRC for clearance and agreement in advance of adopting an uncertain treatment. However, the clearance process is voluntary. The new requirement will level the playing field, promoting fairness in the system.

2.7. Our intention in developing this measure is to ensure that those businesses that are open and compliant in their relationship with HMRC should not have significant

[2] Page 24, HMRC Annual Reports and Accounts 2019-2020, HMRC, November 2020
[3] Page 79, HMRC Annual Report and Accounts 2019 - 2020, HMRC, November 2020

additional compliance costs. If such businesses are already discussing any uncertainties with HMRC, they will not be required to notify again under this regime. We recognise the need for an equivalent treatment for the few large businesses within scope of this measure which do not have a Customer Compliance Manager (CCM).

2.8. With 90%[4] of cases successfully resolved by agreement, the Alternative Dispute Resolution (ADR) process demonstrates the benefits of discussing issues with HMRC rather than progressing straight to litigation

2.9. For all taxpayers, from individuals to the largest corporates, HMRC will always follow the Litigation and Settlement Strategy[5]; a framework to resolve tax disputes in a way that is fair, open, and clear.

2.10. For Corporation Tax (CT), many large businesses are already required to consider International Accounting standards, namely IFRIC23 (*Uncertainty over Income Tax Treatments*), to assess whether it is probable that a tax authority (including a court) would accept an uncertain tax treatment. The concept of examining transactions for uncertainty, for Corporation Tax (CT) purposes, is not new.

2.11. The tax authorities in the USA and Australia have required notification of uncertain CT treatment for several years, so this will be familiar to many large businesses with international reach.

2.12. The Australian Tax Office (ATO) considers that the reportable tax positions (RTP) schedule can play an important role in the tax risk governance framework of large companies. RTP schedule disclosures can highlight potential areas of dispute with the ATO. Conversely, they may provide a board with the confidence that the ATO are unlikely to undertake an intensive review of their arrangements[6].

2.13. The ATO equivalent regime uses notifications to:

- tailor engagement and work with taxpayers to resolve concerns and provide assurance over complex high-risk arrangements,
- improve understanding of the risk profile and corporate governance of taxpayers and how to engage with them,
- identify where there is need to provide further clarification or certainty on the correct tax treatment of complex high-risk arrangements and transactions, and
- better understand tax risks across the large business population[7].

2.14. Therefore, this measure is intended to help reduce the legal interpretation portion of the tax gap by requiring large businesses to notify HMRC where they have made a

[4] Page 113, HMRC Annual Report and Accounts 2019 - 2020, HMRC, November 2020
[5] "Litigation and Settlement Strategy (LSS)", HMRC, October 2017
[6] Australian Tax Office - Reportable Tax Positions Schedule C - Findings Report, ATO, January 2021

[7] Australian Tax Office guidance - Reportable Tax Positions, ATO, July 2020

tax treatment that is uncertain. The aim of the measure is to identify and clarify uncertainties earlier than they would otherwise be identified (if at all) and identify businesses that are pushing the legal boundaries, to create a level playing field.

2.15. Where businesses are already bringing these uncertainties to HMRC's attention, they will not need to notify under this measure. This will therefore focus the requirement to notify on those businesses that are not already engaging with HMRC.

Question 1: Do you support the government taking action to close the legal interpretation portion of the tax gap?

Question 2: If you do not agree with the government's proposed course of action, what alternatives do you suggest to address the problem?

Meaning of uncertain tax treatment

2.16. An uncertain tax treatment is one where there is more than one way to interpret or apply tax legislation in relation to a transaction. This proposal will require businesses to tell HMRC where:

- They have used an interpretation or application, for a transaction, that is contrary to HMRC's known position, or
- They are dealing with a new or novel type of product, transaction or business structure where there are various ways that it can be treated and HMRC's position is not known.

2.17. Chapter 3 explores the definition in more detail and suggests options for enhancing the definition.

Scope of the measure

2.18. The requirement will only apply to large businesses. The threshold for what is a large business, and therefore within scope of the notification measure, has not changed from the previous consultation, and will continue to be modelled on the:

• Senior Accounting Officer (SAO) regime (Schedule 46 to Finance Act 2009[8]), and

• Publication of Tax Strategies (PoTS) regime[9] (Schedule 19 to Finance Act 2016[10]).

Businesses fall within these regimes if they satisfy either or both of:

[8] http://www.legislation.gov.uk/ukpga/2009/10/schedule/46
[9] Reference to PoTS is only in respect of the turnover and balance sheet criteria.
[10] https://www.legislation.gov.uk/ukpga/2016/24/schedule/19

- A turnover above £200 million.
- A balance sheet total over £2 billion.

2.19. The government recognises that an asset manager business's turnover and balance sheet threshold calculation should not include the attributes of fund portfolio companies.

2.20. It is intended that the notification measure will apply to partnerships and LLPs that satisfy the above criteria, as well as corporates.

2.21. In terms of HMRC's customer segmentation, this population will include all of those handled by Large Business, as well as the larger groups in Mid-Sized Business.

2.22. Responses to the previous consultation generally agreed with the definition of large businesses that would be in scope of the measure.

2.23. Originally the taxes within scope of this measure were the same as those included in the SAO regime, namely; Corporation Tax, Income Tax (including PAYE), VAT, Excise and Customs Duties, Insurance Premium Tax, Stamp Duty Land Tax, Stamp Duty Reserve Tax, Bank Levy and Petroleum Revenue Tax.

2.24. However, based on previous consultation, the taxes within scope of the requirement to notify have been reduced to Corporation Tax, Income Tax (including PAYE) and VAT. These taxes make up the majority of the large business share of the legal interpretation tax gap. It will also reduce the administrative burden on large businesses.

Exceptions

2.25. As outlined in the previous consultation (paragraphs 2.12 and 2.13), anything disclosable under a different legislative requirement, will not need to be notified to HMRC under this requirement.

2.26. In addition, many large businesses already have discussions with HMRC regarding areas of uncertainty. If HMRC is already aware of the uncertainty, and how the business plans to treat it for tax purposes, the business will not be required to bring it to HMRC's attention again through the notification process, unless the business treats the transaction contrary to HMRC's recommendation.

2.27. HMRC will expect the same level of detail in these discussions as will be required if a notification was made (refer section 5).

2.28. These discussions will usually be with the business's CCM. So that businesses without a CCM are not disadvantaged, HMRC will provide a method for these discussions to occur for businesses without a CCM.

2.29. Similarly, banks that are signatories to the Banking Code of Conduct will not be required to notify uncertain tax treatments that they discuss with HMRC under the code.

2.30. A number of respondents to the previous consultation suggested utilising the existing Business Risk Review (BRR+) process to exclude businesses from the requirement to notify where they have a low risk rating. There are challenges with this approach:

1) The BRR+ process (and therefore the overall rating) is non-statutory, determined by HMRC, with no right of appeal.
2) Only businesses dealt with by HMRC's Large Business Directorate are part of the BRR+ process.

Nevertheless, the government will explore it further, including whether there is an objective alternative that could exempt low-risk businesses.

2.31. HMRC accepts that there is a balance to be struck in framing an obligation for transfer pricing cases which would not create more uncertainty for businesses, leading to unnecessary notifications. It is currently proposed that the obligation to notify uncertain matters relating to the pricing of related party transactions (either in the form of entries in the companies' accounts or adjustments in companies' returns/computations) could be removed in respect of certain triggers (noted in Section 3). Where such an exclusion is applied, it would not include matters which are related to transfer pricing, such as whether the participation condition is met, or to matters relating to the application of other legislation to transactions which are also affected by the transfer pricing rules.

2.32. The government also accepts that there will be some entities that will satisfy the turnover and balance sheet criteria but are not intended to fall within the requirement to notify, for example, collective investment schemes. These will be excluded from the scope of the legislation.

Question 3: Is there an objective alternative to using BRR+ ratings that could exempt low-risk businesses?

Question 4: Should there be other specific exemptions from the notification requirement?

3. Defining an Uncertain Tax Treatment

Legal interpretation losses

3.1. As outlined in the previous consultation, the objective of this policy is to provide HMRC with timely and accurate information regarding uncertain tax treatments adopted by large businesses which HMRC is likely to challenge. Although the policy objective remains the same, officials have revisited how an uncertain tax treatment is defined, so that the decision whether a notification is required is clearer and more objective.

3.2. This information is sought to better and more quickly address legal interpretation issues.

3.3. The definition of 'legal interpretation' has not changed since the 2019 edition[11] of HMRC's annual tax gap publication:

> *Legal interpretation losses arise where the customer's and HMRC's interpretation of the law and how it applies to the facts in a particular case result in a different tax outcome, and there is no avoidance. Specifically, this includes the interpretation of legislation, case-law, or guidelines relating to the application of legislation or case-law. Examples include categorisation such as an asset for allowances or VAT liability of a supply, the accounting treatment of a transaction, or the methodology used to calculate the amount of tax due as in transfer pricing, or VAT partial exemption.*

3.4. This definition covers a broad and complex range of underlying tax issues and customer behaviours. In some cases (such as VAT partial exemption) the law itself is open to interpretation; in others the case will hinge on the application of principles of the law to highly fact- and/or case-specific circumstances. Equally, in terms of drivers, in some cases the customer may be making a judgement from a position of genuine uncertainty, whilst in others the customer may be taking a position with the deliberate intention of pushing the boundaries of the law to their advantage.

3.5. It is not the intention of this policy to consider or differentiate between these underlying issues and differing drivers, which would complicate the task of defining what must be notified. The requirement will therefore draw and build on existing definitions and requirements, which will be familiar to large businesses and their advisers.

Determining an uncertain tax treatment

3.6. A key concern raised by respondents to the previous consultation was the view that the proposed definition of an uncertain tax treatment – being one that HMRC may challenge or is likely to challenge - was too subjective.

[11] P.24, Measuring Tax Gaps 2020 edition - tax gap estimates for 2018 to 2019, HMRC, July 2020

3.7. The government has accepted this criticism and is proposing a series of more objective triggers, where, subject to any rules regarding exemptions or thresholds, if any trigger is satisfied, the business must notify HMRC.

3.8. The proposed triggers ((a) to (g)) cover different scenarios where the tax treatment:

(a) Results from an interpretation that is different from HMRC's known position.

3.9. The policy is intended to require notification where a business adopts a tax treatment that relies on a different interpretation of the law from HMRC's known position. This would capture tax treatments taken that are not consistent with HMRC's guidance or other material in the public domain, or a position that is inconsistent with HMRC's view, as established in dealings between the business and HMRC.

3.10. HMRC's known position could include published criteria or information that indicates HMRC's view of what it considers higher risk. Where the higher risk criteria were met the notification requirement would be triggered. Paragraph 3.30 covers in more detail what is a 'known' position. If there is no known HMRC position, this trigger would not be satisfied.

3.11. This trigger is more objective than the definition proposed in the first consultation as it requires businesses to consider HMRC's known position.

3.12. For example, a large business makes payments to a group of employees in settlement of claims relating to the employment and termination of the employment. The business is aware of guidance at EIM12965[12] which indicates that HMRC would consider the majority of the payment to be taxable as a termination payment under sections 401-403 of the Income Tax (Earnings and Pensions) Act 2003. The business disagrees with HMRC's position and makes the payment to the employee without deductions.

(b) Was arrived at other than in accordance with known and established industry practice.

3.13. Many industries have an established industry-wide approach to treating certain transactions. This is often published in HMRC manuals or guidance provided by trade representative bodies. A notification would be required where a business adopts an approach that is not consistent with the industry-wide approach. This trigger would not be met where there is no published (either by HMRC or a representative body) industry-wide approach.

[12] Employment Income Manual EIM12965. HMRC, February 2021

3.14. For example, it is established practice that businesses in the goods transport sector claim capital allowances in respect of expenditure on heavy goods vehicles and trailers.

3.15. A large business chooses to treat the expenditure differently, by claiming a full deduction for the expenditure in the year in which it is incurred. This is on the basis that the goods vehicles and trailers are 'tools' for the purposes of Section 68(3) of the Corporation Tax Act 2009.

(c) Is treated in a different way from the way in which an equivalent transaction was treated in a previous return and the difference is not the result of a change in legislation, case law or a change in approach to accord with HMRC's known position.

3.16. This trigger would require notification when a business alters a previously used treatment, where that change is not due to a change in HMRC's known position. There is some overlap with trigger (a) because often either the previous treatment or the new treatment will be contrary to HMRC's known position, this trigger could capture other uncertain treatments where HMRC's position is not known.

3.17. For example, a business originally treats a supply as two separate supplies with different VAT rates but decides to treat the same supplies as a single, complex supply with a single VAT rate. This might be done so the business can apply a zero rate to the whole supply, reducing its output tax.

3.18. Under this trigger, nothing has changed about the supply, there has not been a change in law or new case law. It is simply that the business has reviewed the supply and changed its view of the tax treatment applicable. It is unlikely that both treatments will be correct.

(d) Is in some way novel such that it cannot reasonably be regarded as certain.

3.19. A notification would be required where there is a new or novel product, transaction or business structure where there are various ways that it can be treated and HMRC's position is not known.

3.20. For example, a bank has a presence in the UK and the US. One of its US subsidiaries undertakes valuation services for group companies globally. It charges for these services and in 2018 the UK group was charged £100m. The UK group is registered as a VAT group and has a partial exemption recovery rate of 1%. The inward charge from the US valuation company incurs VAT of £20m, declared as output tax, with the corresponding input tax claim restricted to 1%, or £200k. The bank chose to establish a branch of the US company in the UK, nominally tasked with undertaking valuation work, although it has only 2 employees. The branch applies to join the UK VAT group. HMRC receives no explanation of the reason for this. The US company continues to carry out valuation work for the UK group, but the

charge it makes is routed through the UK branch, so within the VAT group, thus outside the scope of VAT. No reverse charge is due, and the bank saves itself £19.8m a year.

3.21. Another example is whether a new food item is subject to VAT or not.

(e) In respect of which a provision has been recognised in the accounts of the company or partnership, in accordance with Generally Accepted Accounting Practice (GAAP), to reflect the probability that a different tax treatment will be applied to the transaction.

3.22. This trigger is intended to require notifications in situations, although not exclusively, where IFRIC23, or other relevant accounting standard, requires the business to make a provision to recognise the uncertainty in the tax treatment.

3.23. For example, a business encountered a transaction in a niche area. It applied a tax treatment which it believed was correct, but following discussion with the company's auditors took the view that a tax provision should be recognised in the accounts to reflect the likelihood of a different tax treatment being applied.

(f) Results in either:

- **A deduction for tax purposes greater than the amount incurred by the business, or**
- **Income received for which an equivalent amount is not reflected for tax purposes,**

unless HMRC is known to accept this treatment.

3.24. A treatment sometimes will result in a deduction that exceeds the economic cost, but often this is the intention of government, for example, research and development expenditure. This trigger requires businesses to notify when the economic outcome is not the same as the tax outcome and that difference is not intended.

3.25. For example, a company draws up its accounts in accordance with Generally Accepted Accounting Principles (GAAP). However, in interpreting accounting standard FRS23, the business concluded that the company's functional currency was US Dollars. This gave rise to a foreign exchange loss, where no actual economic loss was suffered by the company. HMRC was not known to accept this outcome.

(g) Has been the subject of professional advice, that is not protected by legal professional privilege:

- **which is contradictory, in terms of tax treatment, to other professional advice they have received, or**
- **which they have not followed for the purpose of determining the correct tax treatment of a given transaction.**

3.26. Due to legal professional privilege (LLP), HMRC will not request to see any legal advice. The LPP exclusion would apply where the business had only received the advice in the form of lawyer-client advice for the purpose of advising in the relevant legal context. Where accountancy or tax advice had been received in addition, there would still be a requirement to notify.

3.27. For example, a large business instructs their agent to undertake a hybrids analysis. The agent produces a report which identifies one particular group entity which may be seen as a hybrid, but it would depend on whether HMRC viewed the entity as transparent or opaque. HMRC's position is unclear, but the agent advises their client to file on the basis that the entity is caught by the hybrids legislation at Part 6A of Taxation (International and Other Provisions) Act 2010.

3.28. The large business considers the advice, but decides to file on the basis that the entity is not a hybrid and so not caught by the hybrids legislation. This results in them claiming a deduction of £40m in respect of intragroup interest which they otherwise would not have been able to claim.

3.29. As the large business did not follow their agent's advice, the uncertainty should be notified to HMRC.

3.30. For the purpose of triggers (a) (c) and (f), HMRC's 'known' position or interpretation would include something from:

- guidance, statements, court decisions or other material (whether of HMRC or a Minister of the Crown) that is in the public domain, or
- dealings, in writing, with HMRC by or in respect of the company or partnership in question.

3.31. It is accepted that a particular treatment might satisfy more than one of these triggers.

3.32. A large business makes a decision about whether a tax treatment is uncertain at the time it is 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 a requirement to revisit that year or accounting period). However, if the tax treatment is ongoing, then a notification would be required in the subsequent year or period

Question 5: Do you think that the triggers are sufficiently objective?

Question 6: Can you suggest ways to make them more objective and certain?

Question 7: Do you think any of the triggers will not capture the uncertain treatments they are intended to identify?

Question 8: Are there additional triggers that would identify uncertain tax treatments that would not be identified by these triggers?

Question 9: Which of these triggers do you consider should apply in respect of transfer pricing uncertainties (refer paragraph 2.31), and why?

Threshold for reporting

3.33. In the previous consultation, the government proposed that notifiable uncertain tax treatments are those which, individually or combined (using the principles set out in IFRIC23), result in a difference between the customer's calculation of their tax liability and HMRC's calculation of their tax liability, of more than £1m.

3.34. However, responding to feedback from the previous consultation and to reduce the administrative burden, the government now proposes a threshold of £5m for both direct and indirect taxes.

3.35. The previous consultation asked whether the threshold should be based on an individual materiality threshold for each business. The government's concerns with adopting a materiality threshold, covered in paragraphs 3.43 to 3.45 of the Summary of Responses, are:

1) Materiality is not a common concept in UK tax legislation, and
2) It is not considered to be equitable where there is a different numerical threshold for different businesses depending on their size. For example, an uncertain tax treatment reduces a business's tax liability by £5m, a business with a lower turnover must notify the uncertainty, but a business with a larger turnover need not.

3.36. Nevertheless, the government will further explore the possibility of a materiality threshold.

3.37. Determining HMRC's calculation of a customer's tax liability resulting from an uncertain tax treatment is straightforward for treatments that are binary. However, the government accepts that sometimes the alternative calculation could be within a range.

3.38. The government therefore suggests a two-stage test to calculate whether the threshold is exceeded, and notification is required.

> **Step 1:** Is the total tax impact of the tax treatment £5m or above? The total tax impact includes both deductions taken against taxable income and the non-inclusion of receipts for tax purposes where those treatments would be considered 'uncertain' under the proposed triggers.
>
> For example, if a deduction is being claimed of £30m in relation to something uncertain, then the tax impact would be over £5m (£30m x 19% = £5.7m).

If Step 1 results in the threshold being exceeded, then consider step 2. No notification is required when step 1 does not exceed £5m.

> **Step 2:** If the (biggest) tax difference between the customer's treatment and HMRC's expected treatment is more than the £5m tax threshold, then a notification is required, otherwise it is not.

For example, if the customer claimed a deduction of £30m, but it is known that HMRC's guidance would lead to only a £25m deduction, then there would be no need to notify as the resultant tax on the difference would be under the threshold (£5m difference x 19% = £0.95m).

Where HMRC's position is unknown, or the customer has not calculated the difference between their position and HMRC's, then they could rely on the step 1 test alone.

3.39. It is proposed that the same or similar products, or the same or similar transactions, will be amalgamated when calculating whether the threshold is exceeded, for example, in relation to VAT.

3.40. Similarly, with a new product for which there is no clear treatment, the first year of sales may not produce a tax difference of more than the threshold. In subsequent years, the threshold may be exceeded but the product is no longer new or novel. However, a new product in this situation could still be triggered by (g) where the treatment resulted from external advice (or following in-house analysis) where that advice indicated that there were several potential tax treatments available, and no treatment was certain.

Question 10: Do you agree with the threshold of £5m for both direct and indirect taxes?

Question 11: Considering the concerns outlined about a materiality threshold, do you have further points to support one?

Question 12: Do you agree with the proposed rules to calculate the threshold?

Question 13: If you do not agree with the proposed rules to calculate the threshold, can you suggest an alternative calculation?

4. Method of notification

4.1. The government believes the notification should be easy to make, and if possible, use existing processes already in place to limit any increase in burden to customers and HMRC.

4.2. The previous consultation proposed that the notification should be a single, annual process which encompasses all of the relevant taxes. However, based on responses, notification will still be an annual process, but a notification will be required (if uncertainty exists) separately for each of the relevant taxes. This will mean that notification will occur closer to the time when the uncertain tax treatment was included in a return (particularly for VAT).

4.3. The previous consultation proposed that notification would be required when the SAO certificate is due. However, as this would potentially be before the accounts are finalised, the proposal is now to require the notification when the relevant return is due to be filed.

4.4. For non-annual returns, the government proposes to align the requirement to notify with the date when the last relevant return for the financial year in question is due to be filed. A relevant return, for these purposes, would be a return covering a period in which the end of the financial year falls (i.e. 5 April). For example, if a business submits VAT returns on a quarterly basis and their quarter dates are 31 July, 31 October, 31 January and 30 April, then the last relevant return for the financial year would be 30 April and the due date for that return would be 7 June. If an uncertain treatment needs to be notified, then it would be due on the same date – 7 June.

4.5. The government proposes a group notification option in respect of VAT. Such a notification would exclude tax neutral inter-entity transactions. The same could apply to direct taxes with group companies.

Question 14: Do you think requiring notification for each tax within scope will be easier to comply with than a single notification?

Question 15: Do you agree with the notification being required when the return is due?

Question 16: Do you agree, for non-annual returns, with the notification being required when the last return for a financial year is due to be filed?

Question 17: Do you agree that tax neutral inter-entity transactions should be excluded?

5. Level of Detail

5.1. There has been no change since the previous consultation to the level of detail required in the notification.

5.2. Respondents to the previous consultation suggested that the notification should require information along the lines:

1) A concise description of the transaction;
2) Nature of uncertainty;
3) Periods affected by the uncertainty;
4) An indication of the amount of tax relating to the uncertainty;
5) Date of transaction/event giving rise to the uncertainty;
6) List of connected entities;
7) Details of external legal advisers, but not the advice itself; and
8) Reference to the law, the case law, and/or HMRC's guidance which generates the uncertainty.

5.3. The government intends to publish a list, in guidance, of the information to be provided with a notification. To minimise the administrative burden, the government proposes requiring information in points (1) to (5).

Question 18: Do you agree that the information required in a notification should be covered in guidance?

6. Penalties for failure to report

6.1. The previous consultation proposed:

1. £5,000 on the entity for failing to notify HMRC details of the person responsible to notify.
2. £5,000 on the person responsible to notify, where they should have notified but failed to do so.

6.2. The government has taken on board the responses received and is now proposing to only consider charging a penalty on the large business to which the failure to notify relates. A penalty will not be charged on an individual, except in circumstances where the failure to notify relates to a partnership and the uncertainty is in respect of the partnership return required by section 12AA of the Taxes Management Act 1970. That being the case, it will not be necessary to identify the person responsible for notifying, nor a penalty for failing to notify HMRC of the responsible person.

6.3. We still think that the £5,000 penalty contained within the SAO legislation is sufficient for maintaining the integrity of the principle of a mandatory notification of uncertain tax treatment.

6.4. As mentioned in the previous consultation, the £5,000 penalty will be appealable and there will a reasonable excuse provision.

Question 19: Do you agree failure to notify regarding a partnership return should be charged on the nominated partner?

Question 20: If the penalty is not on the nominated partner, on whom should the penalty be charged?

7. Assessment of Impacts

Summary of Impacts

The summary of impacts have taken into account the impact of deferring implementation by 12-months.

Exchequer impact (£m)	2021 - 22	2022 - 23	2023 - 24	2024 - 25	2025 - 2026
	+5	+15	+45	+40	+40
Economic impact	No economic impacts have been identified.				
Impact on individuals, households and families	There is expected to be no impact on individuals as this consultation only affects large businesses. There is expected to be no impact on family formation, stability or breakdown.				
Equalities impacts	It is not anticipated that there will be impacts for those in groups which share a protected characteristic.				
Impact on businesses and Civil Society Organisations	There will be impacts on large businesses and following this consultation, the government intends to ensure they will be fully explored and detailed. There is expected to be no impact on civil society organisations.				
Impact on HMRC or other public sector delivery organisations	HMRC will require some additional resources to consider the notifications and caseworkers to enquire into them.				
Other impacts					

Question 21: Do you have any comments on the assessment of equality, and other impacts?

8. Summary of Consultation Questions

Question 1: Do you support the government taking action to close the legal interpretation portion of the tax gap?

Question 2: If you do not agree with the government's proposed course of action, what alternatives do you suggest to address the problem?

Question 3: Is there an objective alternative to using BRR+ ratings that could exempt low-risk businesses?

Question 4: Should there be other specific exemptions from the notification requirement?

Question 5: Do you think that the triggers are sufficiently objective?

Question 6: Can you suggest ways to make them more objective and certain?

Question 7: Do you think any of the triggers will not capture the uncertain treatments they are intended to identify?

Question 8: Are there additional triggers that would identify uncertain tax treatments that would not be identified by these triggers?

Question 9: Which of these triggers do you consider should apply in respect of transfer pricing uncertainties (refer paragraph 2.31), and why?

Question 10: Do you agree with the threshold of £5m for both direct and indirect taxes?

Question 11: Considering the concerns outlined about a materiality threshold, do you have further points to support one?

Question 12: Do you agree with the proposed rules to calculate the threshold?

Question 13: If you do not agree with the proposed rules to calculate the threshold, can you suggest an alternative calculation?

Question 14: Do you think requiring notification for each tax within scope will be easier to comply with than a single notification?

Question 15: Do you agree with the notification being required when the return is due?

Question 16: Do you agree, for non-annual returns, with the notification being required when the last return for a financial year is due to be filed?

Question 17: Do you agree that tax neutral inter-entity transactions should be excluded?

Question 18: Do you agree that the information required in a notification should be covered in guidance?

Question 19: Do you agree failure to notify regarding a partnership return should be charged on the nominated partner?

Question 20: If the penalty is not on the nominated partner, on whom should the penalty be charged?

Question 21: Do you have any comments on the assessment of equality, and other impacts?

9. The Consultation Process

This consultation is being conducted in line with the Tax Consultation Framework. There are 5 stages to tax policy development:

Stage 1 Setting out objectives and identifying options.

Stage 2 Determining the best option and developing a framework for implementation including detailed policy design.

Stage 3 Drafting legislation to effect the proposed change.

Stage 4 Implementing and monitoring the change.

Stage 5 Reviewing and evaluating the change.

This consultation is taking place during stage 2 of the process. The purpose of the consultation is to seek views on the detailed policy design and a framework for implementation of a specific proposal, rather than to seek views on alternative proposals.

How to respond

Responses should be sent by 1 June 2021 to:

Adrian Morton
HM Revenue & Customs
Level 5
1 Ruskin Square
Croydon
CR0 2LX

Email: uncertaintaxtreatmentconsultation@hmrc.gov.uk

Telephone enquiries 07816 296155.

A summary of the questions in this consultation is included at chapter 8.

Please do not send consultation responses to the Consultation Coordinator.

Paper copies of this document or copies in Welsh and alternative formats (large print, audio and Braille) may be obtained free of charge from the above address. This document can also be accessed from HMRC's GOV.UK pages. All responses will be acknowledged, but it will not be possible to give substantive replies to individual representations.

When responding please say if you are a business, individual or representative body. In the case of representative bodies please provide information on the number and nature of people you represent.

Confidentiality

HMRC is committed to protecting the privacy and security of your personal information. This privacy notice describes how we collect and use personal information about you in accordance with data protection law, including the UK General Data Protection Regulation (UK GDPR) and the Data Protection Act (DPA) 2018.

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes. These are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 2018, UK General Data Protection Regulation (UK GDPR) and the Environmental Information Regulations 2004.

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals with, amongst other things, obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on HM Revenue and Customs.

Consultation Privacy Notice

This notice sets out how we will use your personal data, and your rights. It is made under Articles 13 and/or 14 of the UK General Data Protection Regulation.

Your data

We will process the following personal data (delete/add as appropriate):

Name

Email address

Postal address

Phone number

Job title

Purpose

The purpose(s) for which we are processing your personal data is the consultation on the Notification of Uncertain Tax Treatment by Large Businesses.

Legal basis of processing

The legal basis for processing your personal data is that the processing is necessary for the exercise of a function of a government department.

Recipients

Your personal data will be shared by us with HM Treasury.

Retention

Your personal data will be kept by us for six years and will then be deleted.

Your rights

- You have the right to request information about how your personal data are processed, and to request a copy of that personal data.
- You have the right to request that any inaccuracies in your personal data are rectified without delay.
- You have the right to request that any incomplete personal data are completed, including by means of a supplementary statement.
- You have the right to request that your personal data are erased if there is no longer a justification for them to be processed.
- You have the right in certain circumstances (for example, where accuracy is contested) to request that the processing of your personal data is restricted.

Complaints

If you consider that your personal data has been misused or mishandled, you may make a complaint to the Information Commissioner, who is an independent regulator. The Information Commissioner can be contacted at:

Information Commissioner's Office

Wycliffe House

Water Lane

Wilmslow

Cheshire

SK9 5AF

0303 123 1113

casework@ico.org.uk

Any complaint to the Information Commissioner is without prejudice to your right to seek redress through the courts.

Contact details

The data controller for your personal data is HM Revenue and Customs. The contact details for the data controller are:

HMRC

100 Parliament Street

Westminster

London SW1A 2BQ

The contact details for HMRC's Data Protection Officer are:

The Data Protection Officer

HM Revenue and Customs

14 Westfield Avenue

Stratford, London E20 1HZ

advice.dpa@hmrc.gov.uk

Consultation principles

This call for evidence is being run in accordance with the government's Consultation Principles.

The Consultation Principles are available on the Cabinet Office website: Consultation Principles Guidance.

If you have any comments or complaints about the consultation process, please contact the Consultation Coordinator using the following link:

Submit a comment or complaint about HMRC consultations

Please do not send responses to the consultation to this link.