THE 100 GROUP

Mr. Adrian Morton
Notification of tax treatment second consultation, Level 5,
1 Ruskin Square,
Croydon,
London CR0 2LX

1 June 2021

Dear Adrian

Notification of uncertain tax positions

Please find enclosed our response to the consultation document *Notification of uncertain tax treatment by large businesses – second consultation* published on 23 March 2021. Our detailed responses to the questions set out in the consultation are enclosed at Appendix 1.

This response has been prepared by the 100 Group Tax Committee and is intended to speak on behalf of the Group as a whole. The 100 Group membership represents around 87% of the FTSE100 market capitalisation as well as a number of equally significant sized unlisted businesses. We note that whilst this letter expresses the views of the 100 Group as a whole, these views are not necessarily those of individual members nor their respective employers.

In overview, we welcome the constructive changes that HMRC has made to the original proposals for notification of uncertain tax positions which were subject to consultation during 2020, including reducing the taxes in scope and increasing the reporting threshold. This will make the requirement simpler for businesses to comply with. Nevertheless, we still have some concerns that the requirement will result in extra administration for businesses, particularly the very largest due to the scale of their transactions.

We welcome the introduction of the triggers as they give a clearer picture of how to define an uncertain tax position. In principle we agree that several of the triggers are reasonable however some, particularly trigger D, are too broadly drawn and as we explain in our response to question 5, we envisage that businesses may encounter some practical difficulties applying them.

We thank you for the opportunity engage on this matter and hope you find our comments helpful as you move forwards with the proposal. Please do contact our secretariat Hannah Maughan at secretariat@the100group.co.uk should you wish to discuss any of our comments in further detail and she will be very happy to put you in touch with us.

Yours sincerely

Andy Agg
Chair of the 100 Group Taxation Committee

Appendix one – responses to consultation questions

Policy objectives

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

   We support the government taking action to close the legal interpretation tax gap and welcome the opportunity to offer our feedback on these proposals. We have concerns, however, that this new requirement will increase the administration burden on large businesses unnecessarily.

   Uncertain tax treatments are already addressed by a number of other mechanisms including dialogue with Customer Compliance Managers, business risk review, clearance applications, and under the disclosure of tax avoidance rules therefore we are not convinced that the additional administration burden the measure will create for large businesses is justifiable. Even for those businesses who have nothing additional to notify as a result of this measure, there will be additional administration involved in them gaining internal assurance that the requirements have been met.

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

   The legal interpretation tax gap is the result of taxpayers and HMRC taking different interpretations of the law therefore it would be best addressed through the introduction of clearer legislation that is less open to judgement as well as clear guidance.

Exceptions

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

   No comments.

4. ***Should there be other specific exemptions from the notification requirement?***

   None identified.

Determining an uncertain tax treatment

5. ***Do you think that the triggers are sufficiently objective?***

   Set out below are our comments on each of the triggers. We believe that these triggers should only apply to technical differences in interpretation of tax law, rather than differences in estimates or judgements.

   A. *Differs from HMRC's known position* – This trigger seems reasonable in principle however we have some concerns around how businesses will practically be able to determine HMRC's known position. The consultation document notes that this should be determined with reference to "material in the public domain". In our view this should be limited to published HMRC guidance and legislation only as taxpayers cannot reasonably be expected to make themselves aware of views HMRC has expressed elsewhere.

   B. *Differs from industry practice* – This trigger needs to be more clearly defined as it appears vague in the consultation document. For this to be workable HMRC should clearly set out a list of what is considered industry practice for taxpayers to refer to. If taxpayers are aware of industry practice not listed they could request additions. Taxpayers cannot otherwise reasonably be expected to be aware of all industry practice as many industries have a number of representative bodies which may set out differing views.

   C. *Different treatment from previous equivalent transaction* – This seems reasonable however we would recommend that there be a limited look back period of six years.

D. *Novel transactions* – This is highly subjective and potentially could catch anything fact specific. We would envisage it being particularly onerous to determine what is 'novel' as something which is 'novel' to one taxpayer could be common within the marketplace. It is also impossible for businesses to know what HMRC consider 'novel'. We would suggest either removing this trigger altogether or limiting it with a 'main purpose' test.

E. *Provision made in accounts* – This trigger broadly seems reasonable and is not expected to result in a significant burden for businesses to consider. In practice, however, there may be instances where groups book provisions in the group accounts but not the entity accounts or vice versa. Clarification on these situations is needed to ensure the correct level of disclosure is provided to HMRC.

F. *Income not reflected or deduction exceeding expense* – It is unclear why this trigger is needed in addition to Trigger A as we think it is likely that anything caught by trigger F would already be notifiable under A to the extent it is not already reported to HMRC under DOTAS.

   If this trigger is introduced it should be made clear that it excludes targeted tax incentives, such as R&D, which are intended to create an enhanced tax deduction or exempt income from tax, and that this is what is meant in the consultation document by "HMRC is known to accept this treatment".

G. *Contrary to professional advice* – Should this trigger be introduced some clarifications are needed. Clarity is needed on whether this would only apply to advice where the adviser has explicitly indicated they disagree with the tax position and that it does not extend to tax positions where an adviser has highlighted a risk of HMRC challenge or suggested more than one valid treatment.

   There may also be scenarios where a company obtains advice from two or more advisers on a matter and the advice conflicts. Guidance on what is notifiable in this situation would be helpful.

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

Please refer to our response to question 5.

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

No comments.

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

None identified.

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

In our view, transfer pricing should be entirely outside the scope of this requirement. HMRC already has good visibility of the largest businesses' transfer pricing affairs through country by country reporting and we note that HMRC is separately consulting on a requirement for businesses to submit an international dealings schedule.

Transfer pricing is highly subjective and fact specific and differences of opinion between HMRC and taxpayers tend to arise from methodology and valuation differences rather than differences in legal interpretation which this requirement is focused on.

Threshold for reporting

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

We welcome the increase in the proposed threshold from £1m in the initial consultation to £5m however we feel strongly that a fixed one-size-fits-all threshold disadvantages the largest businesses as, while they will not necessarily have a higher level of tax uncertainty, due to the size of their transactions they will inevitably have more to notify. We believe it would be much fairer to apply a flexible materiality threshold, for example a fixed percentage of turnover.

£5m is particularly low for VAT.

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

See our response to question 10.

12. ***Do you agree with the proposed rules to calculate the threshold?***

We broadly agree with the proposed rules however clarity is needed on step one of the calculation in respect of the proposal that "the same or similar products, or the same or similar transactions, will be amalgamated when calculating whether the threshold is exceeded." To make this simple to apply the £5m threshold should be applied annually so that there is no need to consider aggregation over more than one year.

There needs to be greater specificity on what transactions need to be amalgamated. In some cases this should be straightforward such as aggregating the impact of a payroll treatment on all employees of a company rather than a per employee basis however in other areas it will be less clear. For VAT, where there are many small transactions it could become particularly onerous to determine whether the tax impact of an uncertainty cumulatively exceeds £5m. Clarity is also needed on whether amalgamation of transactions is on a company rather than a group basis. We would support it being on a company only basis.

It is similarly unclear whether there are instances where different taxes would be considered to be part of the same tax position. For example, in the event of a demerger would it be necessary to add the corporation tax, income tax and VAT treatments of all of the transactions associated with the demerger together to the extent the treatment is uncertain? We would expect the answer to this to be no on the basis that the tax treatment of each item would be subject to distinct areas of the tax legislation however this needs to be clarified.

Finally, it is unclear whether timing differences need to be notified e.g. if there is a difference of an interpretation around whether a building qualifies for R&D allowances or SBAs, as ultimately there will be no difference in the tax paid.

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

As per our comments at question 10 we would prefer the threshold to be set as a percentage of turnover in line with audit materiality.

Method of notification

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

One notification is generally easier than several however, given the differing tax return deadlines for the taxes in scope it seems sensible to have separate notifications for each.

15. ***Do you agree with the notification being required when the return is due?***

The deadline should be when the tax return is filed so that where a tax return is filed late, then as long as the notification accompanies the late filed return, the notification requirement has been met.

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?***

    We agree on the basis this should reduce the administrative burden for PAYE and VAT however, for PAYE clarity is needed on which return the notification should be aligned to. It is currently unclear whether the PAYE notification should be linked to the P60 filing in May, the P11D filing in July or the final monthly return of the year.

17. ***Do you agree that tax neutral inter-entity transactions should be excluded?***

    Yes, we support this exclusion. Given that HMRC already receives information on legal entity restructuring via the international movement of capital regime, this should extend to transactions with overseas companies as well as UK-UK.

Level of detail

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

    Yes, we agree.

Penalties for failure to report

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

    No comments.

20. ***If the penalty is not on the nominated partner, on whom should the penalty be charged?***

    No comments.

Assessment of Impacts

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

    No comments.