

FB 2021-22 - Uncertain tax positions

Lecture P1291 – 10.91 minutes

This legislation has been put out to consultation but there are some changes to the draft provisions that are contained within Clause 94 and Schedule 15.

The law will be changed to require very large companies and partnerships to notify HMRC where they take a tax position in their returns for VAT, corporation tax or income tax (including PAYE) that is 'uncertain'. The new rule will apply for returns filed with effect from 1 April 2022.

Companies and partnerships affected are those with either turnover in excess of £200 million or gross assets in excess of £2 billion. This is 'UK turnover' and 'UK balance sheet'.

For a UK company or partnership, the UK turnover is all of the turnover and the UK balance sheet is the balance sheet total (i.e. the total assets). If it is part of a group, the turnover figures include the turnover of any member of the same group as the company at the end of their previous financial year and within the charge to corporation tax on income at any time during the company's previous financial year.

The balance sheet figure is the aggregate of the UK balance sheet totals for the company and any other company that falls within the above. The group relationship is established through 51% subsidiaries and there are various exemptions within the definition.

For a non-UK company take the turnover and balance sheet which relates to activities in respect of which that company is subject to corporation tax. For a non-UK partnership, it is the turnover and balance sheet attributable to a permanent establishment within the UK.

The company or partnership has to notify HMRC if a relevant return includes an 'uncertain amount'. The use of the phrase 'includes an amount brought into account' can include the absence of an amount that would be brought into account if it were not for the uncertain tax treatment so it can effectively be an amount of nil. If an amount becomes uncertain after the return is filed, then HMRC must be notified if it becomes uncertain by virtue of an accounting provision being made to reflect the probability of a different tax treatment applying.

The notification requirement also applies to amended returns. A separate notification is needed for each relevant tax that includes an uncertain amount but only a single notification is required if it is the same tax but there is more than one uncertain amount.

HMRC will, in due course, give notice of the format of the notification.

The deadline for notification is broadly the due date for the return but specifically:

- for a company return for a financial year, on or before the filing date or, if later, the last day for delivery of accounts to the registrar of companies;
- for a partnership return for a financial year, on or before the date on which the return is required to be made;
- for an amount included in a PAYE return for a financial year, on or before the date on which the last PAYE return for the financial year is required to be made;

- for an amount included in a VAT return for a financial year, on or before the date on which the last VAT return for the financial year is required to be made.

If the notification is required as a result of an amendment to the return, the notification must be made before the end of the period of 30 days from the day on which HMRC is notified of the amendment.

An 'uncertain treatment' is defined as arising either where a provision has been made in the accounts for the uncertainty, or the position taken in the accounts is contrary to HMRC's known position (as stated in the public domain or in dealings with HMRC).

A third trigger, that was proposed in revised draft legislation published in July 2021, which would be where there is a substantial possibility that a tribunal or court would find the taxpayer's position to be incorrect in material respects is not being included at this time. However, it is stated that the government remains committed to further consideration of its inclusion at a later date.

There is no notification requirement unless the threshold test is met. This is where the aggregate of all tax advantages relating to uncertain treatment is more than £5m. This is reduced proportionately if the accounting period is less than 12 months.

Tax advantage is defined in the normal way for income tax or corporation tax in terms of avoidance or reduction in charge; repayment or increased repayment; relief or increased relief; deferral of payment or advancement of repayment; avoidance of possible assessment and avoidance of obligation to account for or deduct tax. There are similar parameters for VAT purposes.

The value of the tax advantage is measured by comparing the uncertain amount in the return and the expected amount as defined in the legislation ignoring group relief (as well as group relief for carried forward losses) and relief for repayment of loans to participators.

If the tax advantage gives rise to a loss which is utilised, the relief is the measure of the tax advantage but if the loss is not used (or only partially used) the tax advantage is taken as 10% of any unused loss plus any tax saved by the part used. This will be nil if there is no reasonable prospect of the loss being used to reduce the tax liability of any person.

The expected amount in this formula is the tax liability calculated without the uncertainty. If there is more than one interpretation by HMRC, the one used is the one which gives the least amount of tax advantage. Where more than expected amount can be calculated as both of the triggers apply, the threshold test applies by reference to whichever gives the most tax advantage.

Where the return in question is a return under PAYE regulations, NICs are to be treated as income tax for the purposes of determining the aggregate value of tax advantages to measure against the threshold.

There is no notification requirement if it is reasonable to conclude that HMRC already have all the information which would need to be included in the notification. Specifically, this applies where HMRC have already been notified under DOTAS or similar.

There is also an exemption where transactions are between group companies and the net effect of the transaction is that the tax advantage obtained by the group as a whole is less than the threshold.

Penalties for failure to comply are:

- £5,000 for the first failure
- £25,000 for the second failure within three years of the financial year for which the relevant return requiring notification was delivered to HMRC
- £50,000 for any further failure within the three year period
- £5,000 where the failure relates to notification that an amount has become uncertain after the return has been filed.

No penalty arises if the person has reasonable excuse for the failure. Normal assessment and appeal procedures apply to the penalty.

To put this measure in context, the objective is to reduce the 'legal interpretation' portion of the tax gap which is estimated at £5.8bn with £3.2bn of this felt to be attributable to large businesses. It is intended to enable early identification of high risk disputes and encourage early interaction between large business and HMRC.