

Uncertain tax positions – consultation 2 (Lecture B1274 – 15.43 minutes)

Introduction

Following feedback from its initial consultation in March 2020, the Government has issued a second consultation. The closing date for comments is 1 June 2021.

Definition

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:

1. They have used an interpretation or application, for a transaction, that is contrary to HMRC's known position, or
2. 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

Revised proposals

From April 2022, large businesses will be required to notify HMRC when a trigger is satisfied (see later) if:

1. Turnover exceeds £200m, and/or
2. The balance sheet total exceeds £2 billion

The proposal will apply to companies, LLPs and partnerships.

Reportable taxes are corporation tax, income tax, PAYE and VAT. The original proposals to include duties, IPT, SDLT and other taxes covered by the SAO regime have been dropped.

No disclosure is required if the transaction is disclosable under DOTAS or is subject to open enquiry by HMRC.

A business is also not required to make separate disclosure if HMRC is already aware of the uncertainty unless it is treated differently to HMRC's recommendation.

The tax outcome of uncertain items must be more than £5 million otherwise there is no requirement to disclose. This is an increase from the original proposal of £1 million.

If the tax related to the uncertain item is more than £5 million, this is then compared to the expected HMRC position and disclosure is only required if the difference between the two positions exceeds £5 million. If HMRC's position is unknown, then disclosure is required if the tax related to the uncertain items exceeds £5 million.

Nil returns are not required and there will be separate notifications for different taxes.

Information to be reported

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;

Due dates

The due date for a corporation tax uncertain tax position is the normal filing date for the CT600 tax return, i.e., 12 months after the end of the chargeable period.

For quarterly returns (e.g., VAT), the normal filing date is the due date for the last return in the year

For example, if a company files VAT returns for quarters to 31 July, 31 October, 31 January and 30 April each year, the due date of a VAT uncertain tax position return would be based on the 30 April return due date, i.e. 7 June.

Uncertain tax position triggers

1. The interpretation is different from HMRC's known position (e.g. different from HMRC's guidance - which is not the law of course);
2. The position was arrived at other than in accordance with known and established industry practice;
3. The transaction has been treated differently from the way in which an equivalent transaction was treated in a previous return, where case law or the legislation has not changed;
4. The position taken is novel such that cannot reasonably be regarded as certain
5. Provision has been made in the accounts under GAAP to reflect the probability that a different tax treatment will apply;
6. The position results in a deduction greater than the amount incurred or income received which is not reflected for tax purposes, unless clearly permitted/required by tax law (e.g. 130% super-deduction) or HMRC is known to accept the treatment;
7. The position was taken on professional advice (not protected by legal professional privilege) which contradicts other advice received or which was not followed for tax purposes.

Penalties

There is a £5,000 penalty for not making notifications when required. This is chargeable on the company not the individual responsible for filing the return.

The penalty is appealable and subject to a reasonable excuse defence.

The original proposal for a £5,000 penalty for not naming the person responsible for filing the UTP returns has been withdrawn.

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