



TAXREP 55/15 (ICAEW REPRESENTATION 145/15)

IMPROVING LARGE BUSINESS COMPLIANCE

ICAEW welcomes the opportunity to comment on the [Improving Large Business Compliance](#) published by HM Revenue & Customs on 22 July 2015.

This response of 13 October 2015 has been prepared on behalf of ICAEW by the Tax Faculty. Internationally recognised as a source of expertise, the Faculty is a leading authority on taxation. It is responsible for making submissions to tax authorities on behalf of ICAEW and does this with support from over 130 volunteers, many of whom are well-known names in the tax world. Appendix 1 sets out the ICAEW Tax Faculty's Ten Tenets for a Better Tax System, by which we benchmark proposals for changes to the tax system.

We should be happy to discuss any aspect of our comments and to take part in all further consultations on this area.

On 3 August 2015 we attended a meeting with HMRC, jointly with business, professional firms and other professional bodies] in which participants were able to put forward some key comments and concerns and discuss aspects of the consultation document.

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ICAEW members operate across a wide range of areas in business, practice and the public sector. They provide financial expertise and guidance based on the highest professional, technical and ethical standards. They are trained to provide clarity and apply rigour, and so help create long-term sustainable economic value.

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General comments

Transparency in relation to corporate behaviour and outcomes

1. We strongly believe that there is a need for an appropriate amount of meaningful information about the corporation tax system to provide the required information for governments, as well as understanding and clarity for the tax community and taxpayers more generally.
2. At the present time we believe that the more “granular” data needs to be provided to tax administrations, by business and taxpayers more generally, so that governments can run, and administer, the tax system in accordance with the rules laid down in law. IN relation to the corporate tax sector this is in line with the recommendations of the OECD BEPS Action Plan, published on Monday 5 October 2015, and, in particular, Action 13 designed to enhance transparency for tax administrations.
3. There also needs to be sufficient information in the public domain to provide an understanding of how the tax system is working and provide confidence that it is working as it should. But we do not believe that all information ought necessarily to be in that public domain.
4. There are a number of ongoing public “debates” about the right level of public disclosure. Within OECD the BEPS Action Plan (Base Erosion Profit Shifting) has transparency as one of its three core themes and the European Commission Action Plan to strengthen the fight against tax fraud and tax evasion launched in December 2012 is also considering equivalent issues. In the latter case there was a very recent public consultation which closed in early September on further corporate tax transparency to which we responded and we republished our comments, in the public domain, in [TAXREP 44/15 Public consultation on further corporate tax transparency](#).
5. The present consultation sets out the government’s intention to introduce a legislative requirement for all large businesses to publish their tax strategy, enabling public scrutiny of their approach to tax planning and tax compliance and in paragraph 2.28 it sets out areas which could be covered including:
 - Overview of internal governance
 - Approach to risk management
 - Attitude to tax planning and appetite for risk in tax planning
 - Attitude to relationship with HMRC
 - Whether the UK group has a target Effective Tax Rate (ETR)
6. We understand HMRC will recommend that a target ETR is not included in any published tax strategy.

Special measures

7. We are concerned that while these measures are intended to target a very limited number, a mere handful, of companies they will affect many more companies in principle and will undermine the business friendly aspirations of the present government in its design of the tax system.

RESPONSES TO SPECIFIC QUESTIONS

Q1. Do you agree that the threshold above (£200 million / £2 billion) is appropriate for these measures? What other thresholds might we use?

8. There is a considerable amount of additional disclosure and compliance that is required of the very largest businesses in the UK and we believe that the current proposals ought to apply to the same “group” of businesses.
9. The Senior Accounting Officer provisions set out in FA 2009 Schedule 46 apply to companies with turnover in excess of £200m and relevant balance sheets of £2bn (paragraph 15) and we think any provisions such as those in the present consultation document ought to apply to similar companies.

Transparency

Q2. Do you agree there should be a named individual at Executive Board level with accountability for a business’s published tax strategy? If so, do you have any views on who should this be?

10. We believe that the responsibility for complying with the present provisions should be for the Boards of Companies. The current responsibilities are more wide ranging than those applying under the Senior Accounting Officer regime which relates specifically to financial accounting and so it is not in our view appropriate to give the responsibility to a single individual.

Q3. Do you think the areas above are the right areas for a published tax strategy to include? If not, what other aspects of tax strategy are more relevant? Equally, what aspects do you think are less relevant?

11. We are concerned by the requirement to state whether the UK Group has a target Effective Tax Rate (ETR). While we understand the possible rationale for including such a statement, we do not believe that such information will necessarily provide meaningful information to governments or others. Further, groups aiming for an ETR below the headline rate may have no formal policy but pursue such a strategy in any event.
12. If groups publish an ETR then this could have investment consequences, for example if they fail to achieve a reasonably close match to the stated ETR. In certain cases publication could be counterproductive in reputation terms, for example if the ETR was lower than the headline rate but was caused by substantial investment in plant and machinery, its publication might lead to unjustified criticism.
13. From an HMRC webinar on Monday 12 October it would appear that HMRC will not be recommending that a target ETR should be part of a published tax strategy.

Q4. Should the tax strategy be supported by publication of factual information on how it has been applied in practice? If so, what information would be most relevant to demonstrate the application of the strategy?

14. We believe that individual businesses should discuss with their CRM how they have sought in practice to apply the tax strategy but we do not believe that “factual information on how it has been applied in practice” should be published.

Q5. Do you think that businesses should be required to publish whether they are or are not a signatory to the ‘Code of Practice on Taxation for Large Business’ as part of this measure?

15. We believe that any Code of Practice ought to be a voluntary code. At the smaller end of the range of companies that are dealt with by the Large Business Directorate, 2,100 in number, companies will be much smaller and less in the public domain than those covered by PwC’s

surveys of the largest groups in the UK to which a different level of disclosure and public scrutiny is deemed relevant and accepted by the groups concerned.

Q6. What is the right medium for publication of a tax strategy? Where do you think a business's tax strategy should be published?

16. Different groups will have different means of communicating their core messages to their shareholders and the wider public. We do not believe that publication should be in the annual accounts, as this would then need to address the question as to whether such information should be subject to audit. In principle having the information readily accessible on the company's website would appear the best approach, but in the case of inbound foreign groups, they may not have a website or, if they do, the website may not be a UK "based" website.
17. If a tax strategy is to be published we believe it should at the outset be left to the groups how best to communicate their strategy as part of their overall communications activities. After a certain period of time HMRC should review the different approaches adopted and if some seem more appropriate than others then HMRC should consider whether a more prescriptive approach should be adopted.

Q7. What would you see as an effective sanction for non-publication? To whom should this apply?

18. The Consultation Document suggests that sanctions would be modelled on the lines of the current Senior Accounting Office (SAO) regime which is set out in section SAOG 18100 of the relevant Manual. Depending on how the proposed compliance regime is set up then there may need to be provisions for sanctions for not making relevant reports and also not complying with the terms of the published tax strategy. But this is going to be somewhat subjective and there will need to be appropriate safeguards and an independent mechanism akin to the Penalties Consistency Panel to ensure that the failure to comply has been properly assessed and also to ensure that the regime is operated on a consistent basis.

Code of Practice on Taxation for Large Business

Q8. Do you agree that the openness and relationship behaviours contained within the Code of Practice are appropriate for large businesses? Are there any other behaviours you would expect to see?

19. We strongly support openness and transparency in relations between business and HMRC but we are concerned that at the moment the draft Code is all one way: it is what businesses should do. There should also be a clear articulation of what is expected from HMRC in its dealings with large businesses.
20. We also believe that some of the statements in the draft code could be difficult to match up with what happens in practice, for instance the tax planning requirement to "structure transactions in a way that gives a tax result which is not contrary to the intentions of Parliament". There will be many cases where the intention of Parliament may not be clear, either from the legislation or in explanatory notes. It should not be necessary to have to resort to reading Hansard to try and interpret Parliament's intentions and, even then, the intentions of Parliament may still be unclear.
21. As a minimum, we believe that the wording of the Code should be in terms "clearly contrary" to the will of Parliament. However, to help address any lack of clarity, Parliament should consider whether legislation can be framed in terms such that the underlying purpose is clear.

Q9. Do you agree that the governance behaviours contained within the Code of Practice are appropriate for large businesses? Are there any other behaviours you would expect to see?

22. The governance behaviours look reasonable but it should be made clearer that such openness and transparency is subject to materiality considerations.

Q10. Do you agree that the tax planning behaviour contained within the Code of Practice is appropriate for large businesses? Are there any other behaviours you would expect to see?

23. The interrelation between business behaviour and tax consequences is often a dynamic relationship which may not always be “anchored” in the intentions of Parliament even if, as noted above, that intention was clear at the outset. We suggest further consideration is given to the definition of tax planning.

24. Any definition should clearly include a recognition that wholly artificial arrangements for which there is no, or little, economic substance beyond the obtaining of a tax advantage is the sort of egregious behaviour which the government has a legitimate case for taking action against. But we already have a double reasonableness test contained within the GAAR provisions, which was the product of very intensive consultation, and we believe that the government could consider using that definition as a basis for determining what it is that it does not like in terms of tax planning.

Special Measures

Q11. Do you agree with the initial/preliminary framework for entry into special measures? If not what framework do you think would be appropriate?

25. The idea of having an Initial Notice Period during which a company can “improve” its behaviour seems a sensible approach.

26. We are concerned that a lot of the criteria appear to be pretty subjective, with the phrase “it is reasonable for HMRC to take the view” featuring a lot. There needs to be appropriate oversight within HMRC before decisions are taken.

Q12. At what level should thresholds (number of schemes, number of information notices issued, tax at risk, etc.) be set?

27. We do not at the moment have firm views on this.

Q13. Do you agree that HMRC should look back at a business’s recent behaviour when applying these criteria? If yes, to what extent (e.g. three years as in the ‘Promoters of Tax Avoidance Schemes’ regime)?

28. A period of three years would appear to be reasonable but if it extends back before the new regime has been introduced then groups will be “penalised” for actions prior to the new regime coming in to force.

Q14. Is 12 months an appropriate notice period to allow businesses at risk of special measures to demonstrate a significant improvement in their behaviours and approach to tax planning? If not, what period would you propose?

29. Twelve months sounds a reasonable period. It would probably be sensible to tie this in with the accounting year end and make the period twelve months to the end of the next following accounting period.

Q15. Would introducing increased reporting and disclosure requirements for businesses who persistently refuse to engage with HMRC alter behaviour? If not, what other ways might we achieve this objective?

30. We are concerned by the automatic nature of the information exchange proposed.

Q16. Would businesses behaviour be influenced by the withdrawal of certainty from those who refuse to work with HMRC in a transparent or collaborative way? If not, what other ways might we achieve this objective?

31. The lack of certainty comes about from HMRC no longer providing non-statutory clearances or informal opinions. The company in question would still be taxed in accordance with the law.

Q17. Would removing the defence of “reasonable care” from businesses who repeatedly engage in unacceptable tax planning be successful in changing behaviours? If not, what other ways might we achieve this objective?

32. We would be against the removal of the defence of “reasonable care”. If a company pursues a course of action which is a sustainable interpretation of the law, but not approved by HMRC, and has taken reasonable care in pursuing that course of action and the tax consequences of so and made any appropriate disclosure to HMRC, we believe there should not be penalties. Further, if it was removed, what would be put in its place that provided a higher standard of care?

Q18. Would businesses behaviour and approach to tax planning be influenced by public naming by HMRC as being subject to special measures? If not, what other ways might we achieve this objective?

33. We do not have any evidence to answer this question.

Q19. Given the objectives of the ‘Special Measures’ regime are there any other sanctions that you think should be considered, either in addition to, or instead of, those described above?

34. We have no suggestions at this stage.

Q20. In addition to those outlined above, what other safeguards do you think might be required in applying sanctions within special measures?

35. There is no real indication as to what the safeguards would be apart from the statement that they would be “appropriate”.

36. We need more information on the detailed proposals before we will be in a position to answer this question.

Q21. Do you agree that two years is a suitable length of time to remain in special measures? If not, what duration would you suggest?

37. That does seem reasonable.

Q22. Do you agree the criteria for determining exit from special measures are appropriate? If not, what criteria would you suggest?

38. At the moment this looks too subjective and totally within the power of HMRC to determine the outcome. There needs to be appropriate governance in relation to this process and this needs to be spelled out and consulted on before being introduced.

APPENDIX 1

ICAEW TAX FACULTY'S TEN TENETS FOR A BETTER TAX SYSTEM

The tax system should be:

1. **Statutory:** tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.
2. **Certain:** in virtually all circumstances the application of the tax rules should be certain. It should not normally be necessary for anyone to resort to the courts in order to resolve how the rules operate in relation to his or her tax affairs.
3. **Simple:** the tax rules should aim to be simple, understandable and clear in their objectives.
4. **Easy to collect and to calculate:** a person's tax liability should be easy to calculate and straightforward and cheap to collect.
5. **Properly targeted:** when anti-avoidance legislation is passed, due regard should be had to maintaining the simplicity and certainty of the tax system by targeting it to close specific loopholes.
6. **Constant:** Changes to the underlying rules should be kept to a minimum. There should be a justifiable economic and/or social basis for any change to the tax rules and this justification should be made public and the underlying policy made clear.
7. **Subject to proper consultation:** other than in exceptional circumstances, the Government should allow adequate time for both the drafting of tax legislation and full consultation on it.
8. **Regularly reviewed:** the tax rules should be subject to a regular public review to determine their continuing relevance and whether their original justification has been realised. If a tax rule is no longer relevant, then it should be repealed.
9. **Fair and reasonable:** the revenue authorities have a duty to exercise their powers reasonably. There should be a right of appeal to an independent tribunal against all their decisions.
10. **Competitive:** tax rules and rates should be framed so as to encourage investment, capital and trade in and with the UK.

These are explained in more detail in our discussion document published in October 1999 as TAXGUIDE 4/99 (see via <http://www.icaew.com/en/about-icaew/what-we-do/technical-releases/tax>).