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Financial institutions should prepare themselves for compliance with financial institution notices which HMRC can issue, without prior tribunal approval, from Royal Assent of FA 2021. Tax Day announcements reveal the measures that are not going ahead and those for which the consultation process is starting or continuing. The consultation on the reform of the taxation of securitisation companies explores improvements to ensure the UK's tax code keeps pace with the evolving nature of capital markets and contributes to the UK's position as a leading financial services centre. The second consultation on notification of uncertain tax treatment by large business takes on board many of the concerns of the initial consultation but the requirement remains an unwelcome additional administrative burden.

Financial institutions notices

Finance Bill 2021 published on 11 March includes the legislation to bring in the new financial institution notice (FIN) allowing HMRC to obtain information and documents from a financial institution for the purpose of checking the tax position of a taxpayer (which does not have to be an individual) or for collecting a tax debt. A FIN can be issued from Royal Assent of FA 2021 regardless of when the tax liabilities or tax debt in question arose.

HMRC does not require the prior approval of the tax tribunal for this notice, unless HMRC has reasons for not notifying the taxpayer of the details of the request and the reasons for it. The government argues that FINs are essential for the UK to be able to meet the international standard for exchange of information and that they are in line with practice in all other G20 countries.

This is an additional compliance burden for financial institutions, the definition of which includes banks, building societies, insurers, fund managers, wealth managers and some investment entities. There is no right of appeal for financial institutions against unduly onerous requests as the government rejected this recommendation made in the House of Lords Economic Affairs Report. In its response to the report, the government expressed its view that a right of appeal is not needed as other safeguards are in place including that the law will prevent a notice being issued if the HMRC officer considers it would be onerous to comply with. The response points out that many FINs are for routine documents such as bank statements.

If a financial institution (or taxpayer) wishes to challenge a FIN they have the right to judicially review the decision to issue it, but we rarely see success against HMRC in judicial review claims so this does not provide much comfort. The financial institution can also appeal against penalties for not complying with a notice which might be an easier challenge to win.

The requirement to make an annual report to Parliament on the use of FINs is regarded by the government as an important safeguard which will help identify any improvements that can be made in the use of FINs. HMRC intends to consult with financial institutions on the report to discuss their experience of the new power, and their views which will be included in the report. HMRC will also report on the operation of the FIN to the newly established Professional Standards Committee set up to provide oversight of how HMRC administers the tax system. HMRC will analyse and respond to, as necessary, any issues arising from the use of the power.

So it sounds like there is plenty of good intention to spot issues and resolve them in due course, but it remains to be seen how frequently FINs will be issued and just how much of an additional compliance burden for financial institutions they will be.

Tax Day publications

Breaking from the tradition of publishing everything on Budget Day, a number of consultations, calls for evidence and updates on previous consultations were published on Tax Day on 23 March. Despite there being much discussion in the media beforehand about potential changes to capital gains tax, however,

nothing was announced on this and the government has yet to respond to the report of the Office of Tax Simplification in this area.

It was announced that a number of measures will not be taken forward at this time following consultation. This is the case for both the review of trusts and the changes to VAT grouping.

Following the call for evidence in 2020, a consultation on raising standards in the tax advice market is open until 15 June. The consultation seeks views on the definition of tax advice and a requirement to make professional indemnity insurance compulsory for all tax advisors. The aim is to improve tax advice and provide taxpayers with better redress where they have received bad advice.

As part of the government's 10-year tax administration strategy, a call for evidence on the tax administration framework was published to explore how to make tax more straight forward to pay and harder to get wrong, improve experience of the tax system and build and maintain trust between HMRC and taxpayers. This is an opportunity to challenge areas of tax administration that have become entrenched over the last 50 years. One area which could be improved is the process for resolving tax disputes. The call for evidence notes that potential lessons could be learned from international examples and that, for example, the 'enquiry' process in the UK is relatively unique and does not promote the early resolution of issues. The closing date is 13 July.

Two of the announcements from Tax Day (reform of taxation of securitisation companies and the notification of uncertain tax treatment by large business) merit more detailed discussion below.

Reform of the taxation of securitisation companies - consultation

The Taxation of Securitisation Companies Regulations (SI 2006/3296) (the Regulations) came into effect on 1 January 2007 and have been amended a number of times since to provide clarity and certainty. Securitisations are a key source of finance for UK business and an important part of the UK's capital markets. The government is keen to make changes to the tax code to shore up the UK's position as a leading financial services centre. Accordingly, the consultation explores further changes to clarify and/or reform certain aspects of the Regulations and the stamp duty loan capital exemption in Finance Act 1986 s 79 as it applies to securitisations and to insurance-linked securities (ILS).

There are four areas being explored:

- "retained securitisations" where an originator acquires more than 50% of the securities from the note-issuing company. Views are sought on the commercial importance of retained securitisations, the impact on the competitiveness of the UK as a financial services centre of being able to carry out retained securitisations and what changes would be helpful;
- whether the scope of assets which can be securitised should be expanded beyond the current definition of financial assets, and if so what should be included and what would be the implications of this for interaction with other parts of the tax code;
- the operation of the note issuance threshold (currently £10m) for the note-issuing company. There are concerns that having the threshold as high as £10m and the requirement that each single issuance be in excess of £10m restricts access to the regime so the government welcomes views on how this requirement could be changed and what would be the best way (perhaps by requiring an election into the securitisation regime) of minimising the risk that arrangements are then inadvertently caught by the amended rules; and
- the uncertainty of the application of the loan capital exemption from stamp duty (and therefore also SDRT) to securitisation arrangements, to ILS arrangements and to notes issued by insurance special purpose vehicles. Uncertainty about the application of the exemption (in particular, denial of the exemption where returns are related to the profits of a business or carry a right to an excessive rate of return or repayment) can be regarded as a barrier to establishing securitisations in the UK. Workarounds to remove the possibility of stamp duty/SDRT complicate the securitisation process and increase its costs. The consultation asks how best these various uncertainties can be addressed and whether updated HMRC guidance is the answer.

The consultation closes on 3 June and a summary of responses is expected in summer 2021.

Notification of uncertain tax treatment by large business

£4.9bn of tax losses have been identified as caused by delays in identifying and resolving disagreements in how the law should be interpreted. Closing this 'legal interpretation tax gap' is not about tax avoidance but, like so many measures in recent years that have been about tax avoidance, it is intended to get HMRC ahead of the game, drawing out legal uncertainties earlier, enabling HMRC to identify businesses that are pushing the legal boundaries and to begin to challenge taxpayers sooner.

Large businesses (partnerships, LLPs or corporates, in each case with a turnover above £200m or a balance sheet total over £2bn, but excluding collective

investment schemes) will be required to notify HMRC of uncertain tax treatment. In response to concerns raised during the first consultation, the start date was deferred by 12 months. The legislation will be included in Finance Bill 2022 but could apply to transactions which are happening now if they are included in returns due to be filed after April 2022.

The taxes within the scope of the measure have been narrowed down since the first consultation to corporation tax, income tax (including PAYE) and VAT.

Exceptions

There are some proposed exceptions from the requirement to notify:

- banks that have signed up to the banking code of conduct are not required to notify uncertain tax treatments that they discuss with HMRC under the code; and
- large businesses which have already had discussions with HMRC about the uncertainty 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. As the definition of "large" includes some businesses which do not have a CCM, HMRC will provide a method for discussions to occur for businesses without a CCM.

The government is also exploring whether businesses considered low-risk for the business risk review process could be exempted; and whether notification of transfer pricing uncertainty might be excluded in certain circumstances.

Definition of uncertain tax treatment

The initial definition of uncertain tax treatment, being one that HMRC may challenge or is likely to challenge, was criticised by respondents for being too subjective. This has been taken on board in the *second consultation* with a proposed series of seven objective tests where, if any one of those tests are met, the large business will be required to notify. The government is considering whether a specific list of common uncertain tax treatments, along with HMRC's view, could be published alongside HMRC guidance.

De minimis threshold for notification

The proposed de minimis threshold is now £5m (increased from £1m in the initial consultation). There is a two-stage test to calculate whether the threshold is exceeded: the total tax impact of the tax treatment must be £5m or above and the biggest tax difference between the customer's treatment and HMRC's expected treatment must be more than £5m. If HMRC's position is unknown or the customer has not calculated the difference between their position and HMRC's, they can rely on the first stage of the threshold test alone. The same or similar products or transactions will be amalgamated when calculating whether the threshold is exceeded, e.g. in relation to VAT.

There will be further consultation on whether there should be a materiality threshold (in relation to turnover or some other financial indicator) although it is clear from the *consultation response document* that the government has concerns about the fairness of this and whether it would be contrary to the policy objective of reducing the legal interpretation tax gap.

Notification timing and information required

There must be a separate notification for each tax regime and the notification is required at the same time as the relevant return. The government will consult on filing obligations for non-annual returns. A group notification option is proposed in respect of VAT which would exclude tax neutral inter-entity transactions and the consultation document suggests the same could apply to direct taxes with group companies.

Guidance will be published listing the information to be provided with an uncertain tax treatment notification. From this information, HMRC will determine the issue and extent of any potential loss of tax. If HMRC require further information, they intend to take that forward separately, either on a formal or informal basis, rather than as part of the notification process.

Penalty for failure to notify

A £5000 penalty for failure to notify will be imposed on the large business entity, not on an individual as proposed in the initial consultation, unless the entity is a partnership and the failure to notify is in respect of the partnership return required by TMA 1970 s12AA. The penalty will be appealable and there will be a reasonable excuse provision.

Next steps

The consultation closes 1 June. Draft legislation and a tax information and impact note will be published for further comment ahead of inclusion in Finance Bill 2022. HMRC will develop and publish additional guidance for large business on the new regime.

What to look out for:

- The Upper Tribunal is scheduled to start hearing HMRC's appeal in Tower Resources v HMRC (VAT recovery by holding companies) on 19-21 April
- 20 April is the closing date for responses to the HM Treasury call for input on the review of the UK funds regime. Stakeholders are invited to provide views on which regulatory and tax reforms should be taken forward and which of the changes should be prioritised.
- A call for evidence on the simplification of the land and property VAT rules is expected to "follow shortly" according to the Tax Day command paper.
- The Court of Appeal is scheduled to hear the taxpayer's appeal on 11 May in *Target Group Limited v HMRC* on whether loan administration services are debt collection services.

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CONTACT

Mike Lane
PARTNER
T: +44 (0)20 7090 5358
E: mike.lane@slaughterandmay.com

Zoe Andrews
PSL COUNSEL & HEAD OF TAX KNOWLEDGE
T: +44 (0)20 7090 5017
E: zoe.andrews@slaughterandmay.com