27 February 2013

Dear Sirs

HMRC Tax and Procurement Discussion Document and Draft Guidance

The Institute of Chartered Accountants of Scotland (ICAS) welcomes the opportunity to comment on this discussion document. We have canvassed views from across our Taxation and Business Policy Committees. Both are broad based committees of ICAS members with representation from across business and tax advisory services.

ICAS’ Charter requires its committees to act primarily in the public interest, and our responses to consultations are therefore intended to place the public interest first. Our Charter also requires us to represent our members’ views and to protect their interests, but in the rare cases where these are at odds with the public interest, it is the public interest which must be paramount.

Overall we appreciate the policy drivers which suggest that the procurement process needs to address the challenge of aggressive and abusive tax avoidance. We are concerned that the details of the policy in the Draft Discussion document contain some flaws which will inhibit the practical operation of the rules and we highlight these below.

1. **Commencement date** – one month is unreasonable for such a fundamental change, we suggest deferring a minimum of 3 months from 1 April 2013.

2. **Timeframe for declaration** – the proposed 10 year time limit is contrary to the legal requirement of 6 years for keeping documentation, so we are concerned about how practical it will be to enforce. In practice, this will mean different rules apply to taxpayers with different file retention policies, with those who prudently hang onto records likely to be disadvantaged as compared with those who retain them for only the minimum period required. Moreover, we consider it inappropriate that current executives would be penalised for the alleged misdemeanours of their long gone predecessors, when priorities, culture and decision-making may well have changed significantly. We think a 3 to 5 year period would be more reasonable, given the relatively short life cycle of executive management in many companies nowadays.

3. **Retrospective application of the policy** – clarification is required on whether the rules would be backdated or would apply only from the date of the policy change. Perceptions of acceptable and unacceptable tax avoidance have changed over the years and are still evolving, so decision-making on the type of tax planning package undertaken is also evolving. To treat businesses fairly, we believe it would be more sensible to seek to influence future behaviour by only applying to future actions (i.e. from the commencement date onwards).
Retrospective application goes against HMRC strategies of encouraging settlement of the past and improving behaviour going forward.

Our view is that a retrospective effect is excessive and damaging, and would have potentially significant unintended consequences. In particular, this would impact on the competitiveness of UK companies and on the perceived competitiveness of the UK tax system. For instance, companies involved in investing in the UK through merger and acquisition activity involving UK group’s or groups with UK subsidiaries would need to consider the scope for due diligence over a 10 year period, and the uncertainty thus created would have an adverse effect on business valuations and completion processes.

This policy runs contrary to HMRC’s compliance and settlement objectives for past planning, in that taxpayers at risk of falling foul of this under future litigation will be incentivised not to settle, but instead prolong their disputes with HMRC for as long as possible. For example, if a company is in correspondence with HMRC on an issue and an opportunity to bid for a contract is coming up, then it may want to spin out the correspondence so that it is not seen as having failed to fulfill all its obligations. This cannot be in the public interest, nor in HMRCs. As an alternative, settling past misdemeanours should permit a clean certification to be made.

4. **Consistency with policy objectives** - the potentially punitive nature of applying the guidance may in many cases be counter-productive to the stated policy aim of encouraging supplier compliance with their tax obligations. It would also seem illogical that the potential commercial sanctions would only apply to companies that have in the end analysis paid the right amount of tax (whether that position was or is reached through court action or by persuasion or even via an agreed compromise with HMRC), while those other companies that have successfully implemented and defended what may otherwise be considered as unacceptable avoidance, and so who will have paid less tax, will not be affected. So, as currently drafted, the activity that would be dissuaded is losing or conceding on tax avoidance, rather than engagement in tax avoidance.

It would seem that the intended and more sensible policy objectives would be to encourage companies:

a) not to implement further unacceptable tax avoidance; and
b) to concede on current cases of such avoidance, in order to pay the right amount of tax.

Therefore, as well as removing the retrospective aspects, a second necessary facet of the guidelines should be to not penalise companies who wish to concede to tax adjustments and/or modify their behaviour on current issues in light of the new guidelines. This would provide the guidelines with a positive encouragement (to modify behaviour) to add to the current preventative aspects.

5. **Type of businesses and structures** – this needs to be carefully defined to avoid creating easy avoidance mechanisms. For example does this apply to a group, or a particular company in a group? If it is not applied on a group basis, then it would be fairly straightforward for a corporate group who were bidding for government work simply to set up a clean new company for each contract. If it is applied on a group basis, alternative structures such as consortia would probably be explored to circumvent the new rules.

6. **Self-certification** - how is it proposed that self-certifications will be audited by procurement officers? HMRC will not be able to confirm that the self-certifications are correct, because doing so would breach taxpayer confidentiality. Secondly, how is HMRC to check validity of self-certificates by foreign suppliers? We are concerned that in practice this is likely to discriminate against UK suppliers and put foreign suppliers at an unfair advantage. We think it wrong in principle that the UK should introduce tax-related procurement provisions likely to place UK suppliers at a disadvantage compared with their foreign competitors.
A supplier will have to self-certify that they are compliant at a particular point in time. It is unclear to us what should happen if the position changes after their appointment. For example, they might submit a tax return on a basis they believe to be compliant, then they could self-certify and secure appointment as a supplier, then HMRC might open an enquiry which is eventually settled on the basis that the supplier has engaged in unacceptable tax avoidance. Are they then to be removed from being a supplier, even after they have started to perform their contract?

7. **Disadvantaging UK companies** - there is a risk that the guidance puts UK companies at a disadvantage compared to foreign suppliers. It would be an easy matter for a supplier established in a jurisdiction without tax laws equivalent to UK anti-avoidance/anti-abuse rules to confirm that it has not breached any such foreign tax rules, simply because no such rules exist, even if it has been involved in aggressive tax avoidance schemes. And how would self-certifications by foreign suppliers be capable of being checked?

8. **Targeted anti-avoidance rules** (TAARs) - it is currently unclear which provisions of the Taxes Acts would be considered to be TAARs. A full list of TAARs needs to be provided at the earliest opportunity in order to clarify the scope and extent of the proposed policy.

9. **Definition of non-compliance** – on page 5 the definition of occasions of non-compliance includes "general anti-avoidance rules (GAAR, TAAR, etc.)." The use of "etc." is too subjective. For example, we question whether it would be always fair to regard a failed but Dotas-notified scheme as an occasion of non-compliance.

10. **Timings of examples of occasions of non-compliance** (OONC) - the examples appear to suggest HMRC want to be able to claim an OONC at the earliest possible date, in one case at first tier tribunal and in another at Court. We believe that there should be only one occasion which is the final court decision, after the possibility of any further appeal has been exhausted.

11. **Procurement thresholds** – greater clarification is needed to specify what procurement thresholds would be brought within the rules, particularly given the variety of options provided in the references cited in chapter 3 of the Discussion Draft.

12. **Penalties** - confirmation is required that only ‘deliberate error’ penalties should be treated as OONCs. There is no Taxes Act definition of the phrase ‘penalty for civil fraud or evasion’. The Cabinet Office Public Procurement Note states that penalties for late-filing may be disregarded, implying that penalties for careless actions, even without tax avoidance, would not be disregarded. We do not consider this is an appropriate application of this proposed deterrent to tax avoidance planning, and we believe such penalties in themselves are sufficient adverse consequence.

13. **Consultation period and policy development process** – we object to the lack of notice to provide consultation responses to HMRC. Only providing 2 weeks for submissions runs contrary to, and undermines, stated consultation policies and practices and is extremely disappointing when the topic has such potentially significant commercial impact for UK businesses. Rushing policy creates a far greater risk of unintended consequences. Finally, has an impact assessment been carried out to determine what impact this policy may have on economic growth?

We would be happy to discuss any of our comments above in more detail if this would be helpful.

Yours faithfully

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