TAX PROFESSIONALS FORUM

SECOND INDEPENDENT ANNUAL REPORT

27 MARCH 2013

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1. FOREWORD BY THE EXCHEQUER SECRETARY TO THE TREASURY

As part of restoring the UK's reputation for a predictable, stable and consultative tax system, I established the Tax Professionals Forum shortly after the election to ensure that the Government's commitments on better tax policy making are subject to independent scrutiny. These commitments were set out in the document *Tax policy: a new approach.*

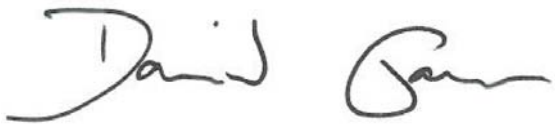
The Forum have produced their second annual report. They have again set out both their support of the better tax policy making agenda and provided an independent voice on new changes that we have introduced.

Since May 2010 the Government has continued to improve the way in which we develop our policy processes as well as providing greater transparency.

Alongside Budget 2011, the Government set out how it would consider policy announcements made outside of the Budget cycle, often in response tax avoidance activity, the *Protocol on Unscheduled Announcements*. We have also published a framework for tax consultations and our wider approach to tackling tax avoidance.

We remain committed to ensuring our approach is relevant and well targeted and we will consider the points raised in this report on those subjects.

As always I would like to thank the members of the Forum for their continued hard work and dedication to the cause of better tax policy. I welcome this report and look forward to my continued discussions with Forum members.



David Gauke MP

TAX PROFESSIONALS FORUM

Second Report of the Independent Members of the Forum

2. INTRODUCTION

This Report covers the period from 6 December 2011, the date of the publication of draft clauses for Finance Bill 2012, and the responses to consultation published on that date, to 30 November 2012; all comments in this report relate to this period unless otherwise stated. The consultation programme during this period has been constant, wide and varied and includes the 2012 Budget. Details of the Forum and its members are set out in Appendix B. We start by outlining the remit of the Forum.

3. THE ROLE OF THE FORUM AND THIS REPORT

The remit of the Tax Professionals Forum is to identify improvements to the way in which tax policy is made. This includes:

(a) the way in which policy is developed;
(b) the way in which policy and changes to policy are communicated; and
(c) the way in which policy is legislated and implemented.

The Forum was established to assist with the prioritisation of improvements and the monitoring and implementation of these improvements to ensure that they have the intended effect. The Forum also has a role in providing contemporaneous feedback on whether the Government's stated principles and the new approach to tax policy making are being followed in practice.

The new approach to policy making was set out in March 2011 "The Government's Tax Consultation Framework: Summary of Responses and Finalised Framework" ("the Framework"). The Framework requires early and continuing engagement on tax changes and the exploration of new ways of broadening public engagement with the development of the tax system. Save in the case of tax avoidance, five stages are to be followed in the development and implementation of tax policy:

(a) Setting out objectives and identifying options
(b) Determining the best option and developing a framework for implementation including detailed policy design
(c) Drafting legislation to effect the proposed change
(d) Implementing and monitoring the change
(e) Reviewing and evaluating the change

The Framework states that, where possible, the Government will engage interested parties on changes to tax policy, minimise the occasions on which it consults only on a confidential basis, set out its strategy for consultation including informal discussions and most importantly at each stage of the

consultation will set out clearly the policy objectives, any relevant broader policy context, the scope of the consultation, its current assessment of the impact of the proposed change and which department and official is leading the consultation.

To enable legislation to be properly scrutinised, draft clauses for the Finance Bill will be published for scrutiny at least three months before the Bill is introduced to Parliament and the period for comment will be at least 8 weeks.

It was also stated, "The Government will generally not consult on straightforward rates, allowances and threshold changes or other minor measures. It may also not consult on revenue protection or anti-avoidance measures."

The Government has in addition published a Protocol on Unscheduled Announcements which deals with changes to tax law outside the framework of the Budget process including retrospective tax legislation[1] (the "**Protocol**"). The Forum has a role in policing the extent to which this statement is complied with.

The Forum is also charged with monitoring the extent to which consultations are informal rather than formal.

This Report contains the views and conclusions of the Independent Members of the Tax Professionals Forum on the way in which policy has been promulgated and developed, legislation has been made over the period referred to in paragraph 1 and contains some suggestions and recommendations for change (and references to the Forum in the rest of this Report are to the Independent Members of the Forum).

4. MAKING TAX LEGISLATION: REFLECTIONS ON THE EXPERIENCE IN THE REVIEW PERIOD

There are five stages put forward in the Framework in the process of making tax legislation. For most consultations, the Forum believes these five stages are both needed and useful. The reasons for this depend on the circumstances. For example, in formulating policy, the Government may have formulated a proposal which goes further than is necessary to achieve the particular policy objective, may be unaware of the effect the proposal may have on other areas, or may not have taken into account other existing legislation. An open formulation of policy allows engagement with the taxpayer.

It is pleasing to report that the period has shown a number of good examples where the five stages have been or are being followed, in particular the consultations on the changes to the CFC rules, the Statutory Residence test, the reform of the taxation of non-domiciliaries, tax relief for decommissioning

[1] "The Protocol on Unscheduled Announcements of Changes in Tax Law", replacing the Rees Rules, which appeared in Chapter 4 of "Tackling Tax Avoidance", published by HMT and HMRC in March 2011.

and a number of others. These have resulted in the taxpayer having a clear understanding of government policy, and policies being developed more effectively and efficiently.

In contrast, however, in other cases, consultations have started:

- part way through the process (such as that on the provisions relating to the transfer of assets abroad and gains made by offshore close companies),

- without a clear articulation of the policy involved (for example, on IR35 and Controlling Persons), or

- without an discussion of the policy (for example, the changes to SDLT on properties owned by non-residents through companies, investment funds and others and the cap on income tax reliefs).

The Government has indicated that concerns over possible avoidance and forestalling mean that it is difficult for some of the changes identified above to follow the normal consultation stages[2]. In our view, such arguments have to be weighed carefully in the balance against the risk of flawed legislation as a result. We believe that the above consultations would all have benefited from going through all five stages of the consultation process.

We believe a key part of making good legislation is the minimisation of surprises. The March 2012 Budget contained a number of detailed tax proposals that raised considerable concerns regarding operational or practical viability, or indeed delivery of the underlying policy rationale. These included the so-called "pasty tax" and the cap on charitable donations, which were subsequently abandoned. It is far better to plan, consult, reflect and then legislate if necessary. We would therefore encourage future changes of a similar nature to follow the normal, five-stage process.

5. RETROSPECTION

As noted above, the Protocol expressly requires the Forum to review any unscheduled announcements and provide Ministers with a view on how the Protocol is being observed in practice. It also states that the Forum may recommend changes to the Protocol.

The Protocol states that:

"2. Such changes[3] to tax law will normally only be announced other than at Budget where:

- there would otherwise be a significant risk to the Exchequer;

[2] See paragraph 8 of the Government's Tax Consultation Framework, published in March 2011.

[3] Those in unscheduled announcements announced outside a Budget and taking place before the legislation is enacted (normally from the date of announcement itself).

- significant new information has emerged to identify the risk or indicate its scale; and
- changing the law immediately is expected to prevent significant losses to the Exchequer."

The Protocol also states:

"In particular changes to tax legislation where the change takes effect from a date earlier than the date of the announcement will be wholly exceptional".

The Protocol therefore encompasses two types of change: changes made immediately from the date of a Parliamentary Statement, and changes made that apply from a date earlier than the date of announcement (retrospective legislation). The Forum endorses the stance taken in the Protocol that:

- there have to be sound reasons for announcing a change outside the ordinary Budget timetable, and

- as a general principle, retrospective legislation is unacceptable.

5.1 Application of the Protocol during the period of this Report

During the period covered by this Report, there was one unscheduled announcement of significance, made in a Written Ministerial Statement published on 27th February 2012. The Ministerial Statement referred to two aggressive tax avoidance schemes that had been disclosed by a bank, and the need to act immediately to safeguard revenue.

Immediate application

One of the two schemes to which reference was made in that Statement involved utilisation of provisions of the Authorised Investment Fund regulations to generate the repayment of tax that had never been paid. Action was taken from the date of the announcement.

It appears to the Forum, based on the information available to us, that the action of the Government falls within the criteria that it has set out in the Protocol.

Retrospective application

The other one of the schemes to which reference was made related to debt buy-backs; the background, including prior legislation in this connection, was set out in the Statement. The Statement mentioned that action was necessary to prevent a loss of revenue of some three hundred million pounds; it also referred to the "wholly exceptional" circumstances (as envisaged by the Protocol), and the fact that the bank concerned had signed up to the Code of Practice on the Taxation of Banking.

Given that this legislation applied retrospectively, the Forum believes that such action needs to meet a far higher hurdle to be justified. Retrospective

taxation imperils the certainty that taxpayers place in the tax system and therefore needs to be considered only in the most extreme situations. The Forum is happy that the facts would have met the criteria for action from the day of announcement, but the precise criteria used to go beyond this and apply the rules retrospectively are unclear.

The Forum considers that the Government should therefore make such criteria more transparent (as discussed below). This will not only assist taxpayers in understanding the certainty that they can place in the tax legislation, but also address the precedential value that the use by the UK of retrospective legislation offers to other countries who are minded to adopt a similar course to the detriment of British business operating abroad.

5.2 Changes to the Protocol on Unscheduled Announcements

As noted above, whilst the Protocol was only published in March 2011 and is detailed on procedure, it says nothing about the circumstances in which retrospective legislation might be adopted. Aside from the reference to "wholly exceptional" circumstances, it does not identify when retroactive legislation might be appropriate. Some greater clarity would provide helpful reassurance. (Reference is made here only to retroactive legislation that imposes a charge to tax where none previously applied or a charge at a higher rate than previously applied. We use retroactive as meaning a change which affects the tax treatment of income profits or gains arising for periods earlier than the date of the legislation).

Members of the Forum acknowledge that there can be occasions when a retroactive change to tax law is justified, appropriate and lawful. But they are rare. Any retroactive change must be compatible with the Human Rights Act and in this respect the jurisprudence of the European Court of Human Rights offers some guidance on the identification of such circumstances. Based on that jurisprudence, the members of the Forum would consider it appropriate that the Protocol adopt an approach under which an unscheduled announcement might envisage retroactive legislation in <u>any of the following cases</u>:

- tax avoidance schemes have come to the attention of HMRC which are highly abusive and involve such a large budgetary risk that the Government considers it appropriate to legislate to cancel the effect of the schemes with retroactive effect (and not simply to announce the reversal of those schemes from the date of the announcement and/or challenge those schemes under existing law, including any general anti-abuse rule). The existence of disclosure rules (enabling the Government to take swift action to close down abusive schemes) and, from 2013, of a GAAR should ensure that there is little scope for retroactive action on this account.

- it has become clear (usually, but not exclusively, as a result of a court decision) that a generally understood tax treatment (understood in common both by HMRC and by the profession, and not by one group

only) is not as it was previously understood to be, and the impact is likely to be significant in budgetary terms or in terms of the impact on existing arrangements;

- to rectify a manifest error in legislation, not merely an issue concerning construction which could be addressed by a court case, where again the impact is likely to be significant in budgetary terms or in terms of the impact on existing arrangements;

AND

- (in all three situations) the public interest in retroactive legislation outweighs the private interests of the taxpayers adversely affected by the retroactive change.

The Forum members present for consideration that the Protocol might be amended to reflect these criteria.

6. TAX SIMPLIFICATION

Since our last Report we have been pleased to see continued positive statements of support from the Chancellor, representatives of HM Treasury and HM Revenue & Customs of the drive to simplify tax legislation and the tax system. This is not simply by way of active participation in the reviews undertaken by the Office of Tax Simplification but also in terms of consultations announced and legislation introduced in the Finance Act 2012 to give effect to the proposals of the Office of Tax Simplification. Simplification is a necessary component in the way in which tax policy is made.

We consider, however, that not all the announcements and legislation enacted during the past year have resulted in tax simplification, and the overall length of legislation has continued to grow. There should be no satisfaction in the enactment of the longest Finance Act ever. Whilst we accept that additional length is not necessarily a measure of complexity (for example where the additional words assist with clarity) such a large volume of legislation loses its accessibility and cohesiveness. Furthermore the route to a simpler tax system will require policy reforms rather than small legislative changes.

We have commented on a number of specific consultations and legislation below from the perspective of the making of tax law. Where appropriate we have also commented upon those that we consider to be steps in the right direction of simplification and upon those where we question whether the approach may lead to anomalies and misunderstanding such that further revision will be required.

7. IMPLEMENTATION OF THE STATED ANTI-AVOIDANCE STRATEGY

This section focuses on two aspects of activity this year, namely “Lifting the Lid on Tax Avoidance”; and the direction of travel on the draft legislation to introduce a GAAR.

7.1 Lifting the Lid on Tax Avoidance

This consultation identifies a number of views taken and techniques used by the private sector which create a gap between transactions which HMRC would expect to be disclosed and those which are actually disclosed.

In particular, the continuing move towards mass distribution of avoidance planning through media, including the internet and email, has been identified. Amendments to the DOTAS regime should be able to counter this to some extent together with education of the target audience (mainly individuals) as to the downside of the products (as suggested in the consultation). There has, however, been little linkage between the DOTAS consultation and the GAAR. The Forum would recommend that consultations focused on the same area should be more closely linked.

7.2 Direction of travel on the draft legislation to introduce a GAAR

The enactment of a GAAR presents a number of special issues in the making of UK tax policy and tax law. This was recognised through the appointment in December 2010 of the Study Group chaired by Graham Aaronson QC to explore the case for a GAAR in the UK. The Aaronson Report concluded that a GAAR focussed on abusive avoidance schemes would be beneficial. The Government accepted the recommendations of the Report and stated it would consult on "new draft legislation which will be based on the recommendations of the Aaronson Report"[4]. One of the objectives of the GAAR is that it "would not erode the UK tax regime's attractiveness to business"[5]. This objective was re-iterated on publication of the Aaronson Report. Certainty is achieved by the focus of the Report on abusive transactions defined by reference to a number of safeguards for taxpayers.

It is clearly difficult to comment on consultations in progress, but concerns have been expressed that the direction of travel set by the current proposed draft legislation does not sufficiently reflect the findings expressed by the Aaronson Report and its initial scope.

In particular, we are concerned in relation to such features as the following:

- Safeguard 2 ("no tax intent") is left out.

[4] Paragraph 2.14, Tackling Tax Avoidance March 2011.

[5] Paragraph 2.59 of the Overview of Tax Legislation and Rates, dated 21 March 2012.

- The "double reasonableness" test has been materially changed

- In an abusive scheme its sole or main benefit will be a tax advantage. The current draft refers to "one of the main purposes" (emphasis added). Many standard transactions have, together with many commercial benefits, a tax benefit.

- Finally, the GAAR gateway of "abnormal features" has also not been included.

The issue of UK competitiveness is vitally important, so the way in which the enactment of the GAAR is taken forward will be a real test for the policy making approach of the Government[6].

Comments on specific consultations and legislation over the period covered by the Report

We set out in Appendix A comments on a number of provisions in the Finance Act 2012 and consultations in relation to which the Forum believe comment should be made either as good or bad examples of the consultative and legislative process. (Please note Appendix A is illustrative and not necessarily comprehensive in terms of those consultations requiring comment). Many of the consultations have been carried out well and much of the resulting legislation is as it should be. That is, it properly implements a policy promulgated after full consultation on the issues concerned. There are others where the Forum considers that greater consultation at various stages of the process might have produced clearer legislation.

8. CONCLUSIONS

The strands which we would draw from the above are as follows:

1. The Protocol or Unscheduled Announcements should, in our view, be amended as described in Section 4 of this Report.

2. Consulting on proposed legislation and going through all five stages of the policy process, even in cases where the Government considers there are risks of forestalling, is generally both necessary and worth the effort. The approach of plan, consult, reflect and then legislate if necessary is, in the vast majority of situations, the right one. If there is a risk of forestalling, an anti-forestalling announcement/legislation should be the preferred solution. Even where a policy is fixed consulting on the mechanics of implementation is worthwhile as this may reveal any flaws in existing policy or alternative methods of implementation.

[6] It is noted that the response document on the GAAR published on 11 December 2012 addressed many of these points, although the Independent Members consider that both the Government and the GAAR Advisory Panel will need to remain mindful of the tax competitiveness dimension.

3. At least on larger consultations, more thought needs to be given to the timetable for the legislative process. Even where there is a full and valuable consultation where government and taxpayer understand the intended policy, the legislation implementing that policy can be overlong, over complex and very occasionally not reflect the intended policy if instructions have to be given to Parliamentary Counsel on a timeframe which starts before part of the consultation process has ended. This is more likely to happen with the revised consultation timetable, because draft legislation has necessarily to be produced at an earlier stage in the process; so in a larger consultation instructions will be given to the Parliamentary draftsman before all responses have been fully evaluated. It may then become difficult to alter or recast the legislation sufficiently prior to enactment.

4. Taking the opportunity during a Consultation in a "Summary of Responses" document to set out in detail the Government policy in a particular area is of immense value to the taxpayer and the Government alike. A notable example where this has occurred is the Response to the SRT consultation.

APPENDIX A

1. Working with Tax Agents: Dishonest Conduct – Open for comment 14 July-16 September 2011. Response published 6 December 2011

This consultation initially failed to recognise that the taxpayer should have to be found guilty of an offence, or liable to a penalty before *separate* proceedings could be brought in relation to the disclosure of documents. It is to the credit of HMRC that the procedural representations made were taken into account.

2. Section 8 and Schedule 1 – High Income Child Benefit Charge

It was initially proposed in October 2010 that child benefit should be withdrawn for higher rate taxpayers. At the 2012 Budget it was announced that there would be an income tax charge for a taxpayer whose income exceeds £50,000 and who receives, or whose partner receives, child benefit. The application of this legislation is so complex that the Forum is concerned that many individual taxpayers will not be able to obtain sufficient clarity about their tax position to enable them to reach the right conclusion to complete their tax returns. This could either unnecessarily discourage individuals from making beneficial child benefit claims or could lead them to make understandable errors. While this may not have affected the policy decision or the ultimate outcome, we believe that it might have assisted had the Government consulted on the mechanisms designed to achieve the policy objective. This might have produced an appreciation of the difficulties involved with the implementation of the proposed policy and assisted with formulating and assessing any possible solutions.

3. Section 19 and Schedule 2 – Patent Box

We have been impressed with the design and implementation (thus far) of the new patent box regime. The policy intention was clear from the outset and the consultation has progressed well from *Stage 1 - Setting out objectives and identifying options* to *Stage 4 - Implementing and monitoring the change* (the current stage).

We also believe that the level of engagement between HMRC and relevant stakeholders in preparing HMRC guidance has been beneficial, most notably the number of businesses taking part in detailed discussions prior to commencement in 2013. In addition, we understand that HMRC are actively seeking feedback from all stakeholders. We believe this has been an example of successful consultation.

4. Section 21 and Schedule 4 – Real Estate Investment Trusts

This legislation contained a major simplification, with the abolition of the conversion charge. There were also a number of relaxations of the existing conditions to facilitate the working of the rules in practice. We consider that this was an effective consultation, and the legislation introduced took into

account input from relevant parties to help the rules now operate in a much clearer manner.

Some Forum Members have seen evidence that more promoters are looking to launch both commercial property and residential property UK-REITs, including potential IPOs on the AIM market.

5. Section 47 and Schedule 12 – Remittance for Investment Purposes

These proposals were consulted upon alongside the consultation on the Statutory Residence Test. The Government refused to alter its initial policy, and the Forum Members believe many taxpayers will find that the proposed relaxation does not go far enough. Having said this, there was a full consultation on the scope of the policy which allowed both the Government and the taxpayer the opportunity to exchange views in this area, which was useful for wider understanding on both sides.

6. Section 180 and Schedule 20 – Controlled Foreign Companies

At the time of our last report (December 2011)[7], the outcome of the CFC consultation was unclear. However, we were encouraged by the clear articulation of policy and the detailed and constructive dialogue that had already taken place. We did express some concern at the time that the proposed regime appeared complex and restrictive.

A response to the Consultation Document was published in December 2011, draft legislation was published in February 2012 and the final draft of the legislation was included in Finance Bill 2012 (which is now Finance Act 2012)[8].

Although we believe that the final version of the legislation does, in general, apply in the way intended, we have a number of concerns about the way in which it has been enacted which mean that it may not be as effective as intended in achieving the Government's stated policy objective of making the UK more attractive to internationally mobile business.

First, the legislation is extremely long and opaque to the reader. We appreciate that some of the length is due to the decision to try and meet the sometimes conflicting requirements of different business interest groups (in particular by having a number of different routes to exemption from the regime). However, there also seems to be something in the drafting process which tends to take clear, well understood concepts and turn them into language that is difficult to construe and may have unintended effects. As taxpayers seek to apply the legislation, anomalies are already being found which may require amendment or clarification. In this particular case, we consider that the drafting issues may have arisen because, although there was a very long period of consultation, the legislation (for what is, after all, a complex area) was actually drafted in a very short period. In future policy

[7] http://www.hm-treasury.gov.uk/tax_forums_tax_professionals.htm

[8] http://www.hm-treasury.gov.uk/controlled_foreign_companies.htm

cycles, we would recommend that the consultation process is planned to allow adequate time for drafting, taking account of the consultation and the comments received.

Secondly, the legislation relies on certain concepts which are drawn from OECD thinking on transfer pricing (SPFs and KERTs and the attribution of profits to permanent establishments). These principles are not particularly well understood by business or (in our experience) HMRC and, in the cases in which they will need to be applied, are likely to leave room for dispute. More generally, we would advise against the use of these concepts outside their strict field of operation.

These two factors mean that there remains some uncertainty in the application of the legislation and there is some evidence that this uncertainty is seen by business as a negative factor in evaluating the tax competitiveness of the UK. Uncertainty can be reduced by the production of written guidance and by the ability to discuss issues with HMRC in advance of making a business decision. However;

- as this group has previously said on a number of occasions, written guidance is no substitute for clear law and, since guidance does not have binding legal effect, it can be difficult for taxpayers to rely on it when making business decisions.

- we are concerned that within just a few weeks of publication of the legislation, a number of members of the team responsible for its implementation at the Treasury and HMRC have already moved on to new roles. This means that taxpayers are already discussing some of the anomalies in the legislation with individuals who are unfamiliar with the legislation or the policy objectives behind it.

In spite of the complexity of the legislation, we would nonetheless conclude that the way in which the policy has been developed in conjunction with the taxpayer is positive.

7. Section 214 and Schedule 35 – SDLT: Higher rate for certain transactions

The changes introduced a 15% charge to SDLT on high value residential transactions by companies and other entities, following an announcement in Budget 2012. This is a measure designed to counteract perceived avoidances effected by acquiring residential properties through corporate wrappers.

The manner of the introduction of this change has given the Forum cause for concern and is again an area where we believe it would have been helpful to have consulted on both the intended scope and the mechanism for implementation. For example, the number of the entities to which the charge applies is wide. It would have been useful to have consulted upon the manner in which the provisions were to apply to bodies other than corporates, for example partnerships, collective investment schemes and

developers. The residential property funds market was particularly seriously affected by the provisions.

In part, the failure of the legislation to undergo proper technical scrutiny as it passed through Parliament was due to it being debated on the floor of the whole House; nevertheless, a consultation on some aspects of the proposals would have been welcome. (The Forum notes that the measure was introduced in this way to prevent forestalling but believes that, given the range of the entities which the legislation originally affected, either the benefits of consultation outweighed forestalling, or the forestalling risk could have been managed through the legislation).

8. Section 227 and Schedule 39 – Repeal of Miscellaneous Reliefs

This Section repeals many of the reliefs identified by the Office of Tax Simplification ('OTS') as being no longer required or anomalous. The thrust of these changes are to be welcomed from a tax simplification perspective and it is encouraging that HM Treasury and HMRC have listened to what the OTS has said and is generally supportive of what it is trying to achieve.

9. Ensuring the fair taxation of residential property transactions – open for comment 31 May – 23 August 2012

This consultation proposed an annual charge and a new CGT charge in relation to the ownership of UK property by certain non-natural persons. We believe that this consultation could have encompassed methods of implementing the proposed policy other than those consulted on. As matters stand, the legislation to give effect to the new charges is likely to be extremely complex.

10. Borderline VAT anomalies, aka "Pasty tax"

The majority of the tax announcements in the 2012 Budget were widely anticipated. The changes related to "Borderline VAT anomalies" were not[9]. The announcement and consultation considered supplies of catering, sports drinks, self storage, hairdressers' chair rental, holiday caravans and alterations to listed buildings. It was the proposals in respect of supplies of catering and their effect on pasties that earned the proposals their nickname "pasty tax".

From a timing perspective, we were concerned by the lack of consultation prior to the announcement (see also our comments in respect of the income tax reliefs cap), the relatively short consultation period (under seven weeks which included the Easter period, which the Forum notes was later increased

[9] See:

http://customs.hmrc.gov.uk/channelsPortalWebApp/downloadFile?contentID=HMCE_PROD1_031984
http://www.architectsjournal.co.uk/news/daily-news/budget-2012-listed-buildings-vat-relief-scrapped/8628264.article
http://www.thevatconsultancy.com/blog/2012/03/vat-in-budget-2012-%E2%80%93-does-it-really-remove-the-anomalies/

to nine weeks owing to the volume of responses) and early implementation date (1 October 2012).

As a general point, members of the Forum understand that the feedback from the affected industries was that HMRC had not taken the time to understand how the various sectors worked before the Chancellor announced the Budget proposals. The "pasty tax" issue generated the most press comment (see below) but there were other examples. For instance, the planned changes to the VAT treatment of caravans did not proceed in the form originally announced because HMRC did not have proper knowledge of the sector (and did not consult with those who did) beforehand. Specifically, the problem was how to define a "static holiday caravan".

It became apparent that the original proposals to tax static holiday caravans at 20% would have a significant impact on the market and on jobs in deprived areas. Deferring the implementation by six months and applying a reduced 5% VAT rate (rather than full VAT rate) softened the impact, as did applying a generous zero-rate BSI test for the purpose of defining those residential caravans that will continue to be zero rated, and ignoring any occupancy restrictions.

Further, the VAT listed buildings transitional rules also had to change. In our view, a better approach would be for HMRC to acquire some of this knowledge before the Chancellor set out the Government's plans.

From a technical perspective, we were concerned that the new test proposed to ascertain whether food would be standard rated (by reference to ambient temperature) had already been discredited as producing absurd results where the ambient temperature is very low or very high (for example, at a market on a winter's day). This point was mentioned during the Commons debate.[10] The end result was that the Government was forced to amend the proposals so as to avoid some of the difficulties identified by consultation respondents and in the press at the time. As the amended proposals would no longer affect the tax liability on pasties; this was described in the press as another "Government u-turn"[11].

The attempt to remove anomalies by "levelling the playing field" was – and remains – a laudable objective. That said, there is an inherent difficulty with defining a VAT "test" as a purposive one. Not only does this arguably conflict with overriding EU VAT principles (which generally require the VAT "test" to be objective rather than subjective – see the recent "Sub One" VAT Tribunal case on hot food[12]). A "purposive test" can also be difficult to interpret. Further, the risk is that further anomalies will be created elsewhere (as the borderline will be moved to a different place). For example, the transitional, anti-forestalling and anti-avoidance rules for listed building alterations and self storage are still overly complicated.

[10] http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm120523/halltext/120523h0001.htm

[11] http://www.bbc.co.uk/news/uk-england-18249944

[12] [2010] UKFTT487

Finally, a typical comment from business was that the starting point for the "anomalies" initiative was tax avoidance and that the law therefore had to be made complex to ensure that all perceived loopholes were closed. A better approach may have been to look more widely at cases of unequal treatment in the VAT world (EU legislation does not permit goods/services which are similar – and therefore capable of being in competition with each other – to be taxed differently) with a commitment to level the playing field (either up or down) across the board. This initiative could have been coupled with a commitment to introduce objective – and easy to administer – VAT "tests". Overall, an easier policy to "sell" to the business community.

11. Consultation on Reform of two anti-avoidance provisions: (i) the attribution of gains to members of closely controlled non-resident companies, and (ii) the transfer of assets abroad

This consultation raises issues of real concern:

First, the consultation responds to a challenge brought by the European Commission by way of Reasoned Opinions issued in February 2011; which raises the question why it took so long for this consultation to be released when the problems to be addressed had been clearly identified. Even with this amount of time, the published proposals appear to have been hastily considered, and the draft legislation lacked many points of detail.

Secondly, the document contained draft legislation, which should only be issued at Stage 3 of the "New Approach to Tax Policy Making". Moving to that stage seems clearly to contradict the promise of the consultation that there would be an opportunity to examine broader aspects of the two bodies of legislation. Had an earlier response been published to the Commission Opinions, it would have been possible to travel through Stage 1 (setting out objectives; identifying options) and Stage 2 (determining the best option). Travelling through those stages might have avoided the result, which has now occurred, that the European Commission considers that the July proposals do not answer the issues raised in the Reasoned Opinions and has announced that it will proceed with the infringement action against the United Kingdom. This is a result that might have been avoided if the correct approach to tax policy making had been followed, and followed in a timely fashion. (The Forum notes that an amended draft of the legislation was published in December following further consultation).

12. Decommissioning Relief Deeds: increasing tax certainty for oil and gas investment in the UK Continental Shelf (July to October)

This consultation followed the announcement of clear principles for reform and a period of detailed working with the industry to develop proposals to a stage where consultation could be undertaken. Such preparation shows the benefit of working cooperatively to bring forward policies, based around a clearly articulated policy intention of the Government. Whilst this area of taxation benefits from a clearly identified taxpayer group, such active and cooperative engagement should be the aim of all consultations.

APPENDIX B - ESTABLISHING THE TAX PROFESSIONALS FORUM

Formal announcement of the TPF – HM Treasury website: 16 July 2010

> "Making the right decisions on tax policy is critical. But a competitive tax system is not only about the level of taxation and the policy choices that determine its incidence; it is also about the quality of tax law and the way we make tax policy."

From a speech by the Exchequer Secretary, David Gauke MP, to the Centre for Business Taxation, Oxford University, 2 July 2010.

The Government has committed to reforming the framework for developing tax policy and making tax law. To oversee implementation of this new approach, the Government has established a forum of tax professionals to be chaired by the Exchequer Secretary. The Forum will meet bi-annually. The membership is set out below (with descriptions at the time of appointment):

- Malcolm Gammie CBE QC – Research Director for the IFS Tax Law Review Committee
- Vincent Oratore CTA (Fellow) – President of the Chartered Institute of Taxation
- Chris Sanger – Global Director of Tax Policy at Ernst & Young and Chairman of the Tax Faculty of the ICAEW
- Jane McCormick – Head of Corporate Tax at KPMG
- Richard Stratton – Partner at Travers Smith LLP and former Chairman of the Law Society's Tax Committee
- Philip Baker OBE, QC – Grays Inn Tax Chambers and Institute of Advanced Legal Studies, London
- Stephen Herring – Senior Tax Partner at BDO LLP
- Francesca Lagerberg – Head of Tax at Grant Thornton

The remit and membership of the Tax Professionals Forum will be reviewed every two years.