Tax Professionals' Forum

The Rt Hon Mel Stride MP
Financial Secretary to the Treasury
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Dear Minister

I am writing to you on behalf of the Tax Professionals' Forum to present our findings in relation to the period from 16 September 2016 to 16 November 2017 (being the date of Royal Assent of Finance No.2 Act 2017). The consultation programme during this period has been constant, wide and varied. It includes two Budgets, two Finance Acts and an Autumn Statement. All comments in this report relate to this period unless otherwise stated.

As set out in our remit, this report is but one way in which the Forum fulfils its role in reviewing the extent to which the policy making aspirations of the Government's Tax Consultation Framework are complied with. We welcome the engagement with you and officials throughout the year on matters of policy making and are particularly pleased that this has helped during a period of transition to the new single fiscal event approach.

As always, the views and conclusions expressed are of the Independent Members of the Tax Professionals' Forum and focus on the way in which policy has been developed and legislation has been made over the period under review. In contrast to our previous reports, we have chosen this time to write to you directly with our key findings, which we would be pleased to discuss with you further. More detail behind the measures that led to our findings are set out in the appendix.

RECAP OF FINDINGS TO DATE

Over the past five years, the Forum has made recommendations in the form of lessons for the Government to adopt, which we believe will improve the policy development process with the aim of improving the quality of legislation and guidance. As we reflect on the progress on these lessons, we have noted that the concerns raised by the Forum fall into a handful of themes. Appendix 1 summarises past recommendations into four themes, namely, improving the consultation process, timetable and process timing, stability and predictability, and internal processes.

It is evident from this summary that common areas of concern have consistently been raised in our reports over the last five years. Although there has been some changes in response to our feedback, we are concerned that the adoption of the above lessons is not consistent.

PRIMARY RECOMMENDATION

In line with the change in the format of our report this year, we wish, in order to prompt further real progress, to focus the attention of the Government on the most prominent theme from the above, namely the way the Government carries out consultations. It is worth noting at the outset that over the years we have seen a visible improvement to how HMRC and HMT run consultations and examples of these improvements have been recorded in previous reports. However, the consistency in conducting sufficient and worthwhile consultation has, and continues to be, a concern.

During the period which this report is reviewing, there are a number of further examples of where the final outcome has been complex and sub-optimal due to the fact that not enough time was given to each stage of the consultation process, or, in other cases, the genuine concerns raised during the consultation period which were not addressed. This has led to either overly heavy reliance on guidance to clarify the intention, or subsequent amendments to the legislation to make it work. Details of these are given in Appendix 1, but include the following:

- Hybrid and other mismatches regime amendments, where we believe the relative speed at which the UK sought to implement the OECD recommendations into UK law left insufficient time for adequate consultation throughout the legislative process. This was compounded by inaccuracies or divergent positions being contained in HMRC's original draft guidance that was not amended and published in a final format until some 12 months after the rules came into effect.
- 'Cleansing' legislation introduced as part of the changes to the taxation of non-UK domiciled individuals, where poor drafting cast doubt over whether the rules applied to most of the transfers to which the provisions were intended to apply.
- The tax treatment of off payroll working rules, where few options were identified in the consultation document and seemingly few of the problems identified by commentators on the consultation were considered. This calls into question whether the first stage should be more accurately described as an early statement of intent, rather than as a consultation.
- Offshore time limits, where Autumn Budget 2017 announced that the assessment time limit for cases of mistakes or non-deliberate offshore tax compliance will be increased to 12 years. There was no stage 1 consultation in relation to this, although there was a limited stage 2 consultation on some of the aspects. Because of the lack of proper policy discussion and setting of objectives at stage 1, the opportunity to establish whether it is appropriate to treat a mistake in the same way as deliberate behaviour was missed.
- The extension of non-resident Capital Gains Tax to all commercial property (including indirect holdings) is a fundamental shift in the taxation of UK land, but the consultation started at stage 3.

As the above examples illustrate, there is still much to do for the Government to ensure that the timetable of legislation is sufficient to allow for greater consultation at the early stages, that there is clarity over the intent of the policy and that the best delivery mechanisms are fully evaluated. Failure to fully undertake the early stages of the process and address the genuine concerns raised leads to the policy having to "go back to the drawing board" at a late stage, with the result being that the final policy is rushed through with too little time to consider all the issues. This ultimately leads to subsequent amendments and/or overly heavy reliance on guidance.

In contrast to the above, we are pleased to note that it has been announced in Budget 2018 that the proposal to amend the conditions for Rent-a-Room relief has been withdrawn. The original call for evidence into the conditions for the relief in late 2017 and early 2018 was followed directly by draft legislation, bypassing consultation entirely. Nevertheless, responses were made to the Government on the practicability of the measure and we welcome that the Government has responded to consultation responses.

OTHER RELEVANT COMMENTS

Avoid introducing complex legislation before significant political events

Given the increasing likelihood of a need for another Budget in Spring 2019 in response to the UK's withdrawal from the EU, or at least, a significant Spring statement, the Forum would like to re-iterate a

previous recommendation to encourage the Government not to rush through complex legislation when the consultation period will be constrained by a significant political event.

Although the Forum recognises the varied political and public pressures of introducing extensive legislation, important lessons must be learnt from previous occasions which lead to insufficient time to properly debate, consult and implement new legislation.

Therefore, the Forum would re-iterate its recommendation that the Government avoids introducing complex legislation when there is insufficient time for consultation and sound policy development. With the Government's bandwidth fully occupied by Brexit, we are concerned complex legislation will not get the full attention and time required.

Retrospection and protocol on unscheduled announcements

In addition, we would like to state that we remain of the view that the protocol on the use of retrospection and unscheduled announcements still needs to be updated as set out in our second report. The relevant section of the report is given at Appendix 2. Notwithstanding this, we do recognise that we have seen limited use of retrospection/unscheduled announcements in the last few years, which is a direction of travel we welcome.

CONCLUSION

Given the similar areas of concerns reappearing each year, the Forum has intentionally focused on the key area of improving consultations in order to concentrate the Government's attention with the aim to make real progress.

The following lessons should be built into the government's consultation process:

- Ensure consultation on proposed legislation and completion of all five stages of the policy process.
- Address genuine concerns raised during the consultation process and avoid 'patching' bad legislation after it is passed
- Do not place too much reliance on guidance in the absence of a properly thought-through policy
- Avoid introducing complex legislation before significant political events to ensure legislation is not rushed through without proper debate

Yours ever,

Christopher Sanger
Chair, and on behalf of, the Tax Professionals' Forum

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Appendix 1

Past recommendations

Improving the consultation process

- Longer periods of consultation can help to build consensus and understanding (2014)
- Feedback is essential to building consensus and understanding (2014)
- Ensuring consultation on proposed legislation and going through all five stages of the policy process (2013)
- Taking the opportunity during a consultation in a "Summary of Responses" document to set out in detail the Government policy in a particular area (2013)
- Ensure that the first stage of consultation is properly undertaken to avoid complexity at later stages (2016)
- Avoid inadequate and poorly designed consultations (2012)
- Clearly define the role of the OTS in the consultation and policy development process (2015)
- Integrate international reform into the UK's consultation framework (2015)

Timetable; process timing

- The policy development process needs to be flexible, both in timing and in outcome (2014)
- All stages of the policy process matter and should be given sufficient time (2015)
- Do not rush through complex legislation in a pre-election finance bill (2015)
- More thought needs to be given to the timetable for the legislative process (2013)

Tax Professionals' Forum 2010-2017

Stability and predictability

- Constant change leads to lack of stability and predictability (2012)
- Deliver on promises or provide explanations when not delivered (2015)
- Allow the tax system to settle and for new measures to 'bed in' before introducing new measures in the same area (2016)
- Ward against complexity which makes the tax system complex to operate (2016)
- Do not place too much reliance on guidance in absence of a proper consultation (2016)

Internal processes

- Reinforce the links between policy makers to avoid inconsistency of approaches in consultations and policy development (2016)
- Avoid conflicts between reform and revenue protection (2014)
- Set the stage for Post Implementation Reviews and future work (2014)

APPENDIX 2

Detailed comments on measures covered by this report

1. Hybrid and other mismatches regime amendments - Finance Act (No. 2) Act 2017 made a number of amendments to the hybrid and other mismatches regime contained in Part 6A of TIOPA 2010, originally introduced in Finance Act 2016. The hybrid and other mismatches rules were introduced in 2016 as the UK's response to the publication of the OECD BEPS Action 2 Report on Hybrid Mismatches in Autumn 2015. While we recognise the UK was a principal sponsor of the OECD BEPS project, we believe the relative speed at which the UK sought to implement the OECD recommendations into UK law left insufficient time for adequate consultation throughout the legislative process. This was compounded by inaccuracies or divergent positions being contained in HMRC's original draft guidance that was not amended and published in a final format until December 2017, some 12 months after the rules came into effect. This has led to significant levels of uncertainty for businesses. We note that many other jurisdictions are yet to implement similar rules and consider it would have been better for the UK to have allowed more time for detailed consultation on the draft legislation and accompanying HMRC guidance before implementation.

2. 'Cleansing' legislation (Part 4) introduced as part of the changes to the taxation of non-UK domiciled individuals – the poor drafting of the legislation in regards to the cleansing rules has cast doubt over whether the rules actually apply to most transfers to which the cleansing provisions were intended to apply. In addition, the drafting does not deal with the format and timing of the nomination required, which is now causing difficulty between HMRC and the professional bodies and confusion for advisers. This could have been avoided by specifically dealing with this in the legislation. Further, the interpretation of the effect of an "over-nomination" in this legislation is unclear, which was fed back to HMRC during consultation but on which no drafting amendments were made.

   These concerns were widely raised with HMRC during the consultation process but were not addressed in the final draft of the legislation. This has meant unnecessary uncertainty has crept in and will mean unnecessary reliance on guidance.

3. The tax treatment of off payroll working has been problematic for many years and attempts have been made to mitigate the problems on several occasions during that time. The current change legislated by s6, FA 2017 began with a consultation in May 2016, proposing changes to the tax rules governing workers' services provided to the public sector through intermediaries.

   We note that, because there were few options identified in the consultation document, the policy was implemented almost exactly in accordance with the design set out at the consultation stage. Seemingly few of the problems identified by commentators on the consultation were considered and there have been practical problems with implementation as a result. This calls into question whether the first stage should be more accurately described as an early statement of intent, rather than as a consultation.

   The most immediate problem was uncertainty at implementation. The law had not been finalised on 6 April 2017, from which date employers were expected to apply the change. There have been problems with the Check Employment Status Tool (CEST) and uncertainty over the accounting treatment. There is still no clear appeal process for workers who disagree with the treatment applied to their contracts.

   Having compressed the first stage of the policy setting process, the Government has put itself into a difficult position by implementing the change before addressing the problems which had been identified. We note the rules are now to be extended in 2020 to the private sector. However, it will

be important to undertake a review of the public sector system, make the necessary changes and allow time to revisit stage 2 to develop an improved framework for implementation, before the policy is rolled out to the private sector.

4. Offshore time limits - At the Autumn budget 2017 the Government announced that the assessment time limit for cases of mistakes or non-deliberate offshore tax compliance will be increased to 12 years. There was no stage 1 consultation in relation to this, although there was a limited stage 2 consultation on some of the aspects (including whether it should apply to Corporation Tax). Because of the lack of proper policy discussion and setting of objectives at stage 1, the opportunity to establish whether it is appropriate to treat a mistake in the same way as deliberate behaviour was missed.

5. Non-resident CGT - The extension of CGT to all commercial property (including indirect holdings) is a fundamental shift in the taxation of UK land. The consultation started at stage 3 (draft legislation). This has meant that potential issues around the targeting of this measure, as well as how it is to be achieved, were missed which has put pressure on the consultation process in regards to the drafting of the legislation. Pressure is further added as the effective date the measure comes into force is still April 2019.

6. Changes to Entrepreneurs Relief - This consultation stated only that it was a new consultation with no reference to which stage of the policy development it related to. The consultation indicated that 'after consultation, the Government will publish its response and draft legislation in the summer of 2018'. This consultation appeared to be a stage 2 consultation but one which presented one policy option rather than seeming to determine the best option (which is what stage 2 is meant to do).

   In the summary of responses, the Government said that it remains 'open minded' about the impact on business decision making of the loss of this relief but it is proceeding in any case.

7. Corporate Interest Restriction **-** The corporate interest restriction is an example of legislation where the consultation was well-managed but, given the complexity of the task, was carried out in too short a time. The first initial consultation was in October 2015 which closed in January 2016. This was followed by a detailed policy design and implementation document published in May 2016.

   This document was an in-depth discussion of how the new provisions might operate but, even so, there were several areas where further detail and thought was required. The size of the task meant that only part of the legislation could be published on the normal publication date in December 2016, the remainder being released in January 2017, only two and a half months before the provisions were to come into force. There were significant technical issues with the rules which required further correction, most notably the definition of the "debt cap" which had to be amended to include provision for carried forward amounts and amendments to the related party provisions so that guarantees did not result in the debtor becoming connected with the lender.

   The changes made were extremely welcome but were only contained in the draft Finance (No 2) Bill 2017 published on 20 March 2017. The delay in the enactment of the Finance (No 2) Act 2017 meant that some groups had to estimate their liability on the basis of rules which had not become law even by the time they had to make payments of tax on account. This would be less important were the rules to be straightforward and easy to interpret. However, the provisions are long, taking up about one quarter of the statute. While the hiatus caused by the general election could not have been foreseen, consideration could have been given to delaying the commencement of these rules to allow taxpayers more time to understand their implications.

8. Disguised Remuneration - The changes to the disguised remuneration regime started before, and ended after, the period covered by this report. The changes were split over three Finance Acts: Finance Act 2017, Finance (No.2) Act 2017 and Finance Act 2018. The consultation issued in August 2016 was a stage 3 consultation on all the proposed disguised remuneration changes, namely the

close company gateway, the loan charge and the self-employed disguised remuneration charge. At the March Budget in 2017, the Government announced that the close company gateway would be legislated in a later Finance Bill (and would come into force on 6 April 2018 rather than 6 April 2017) to allow further consultation with stakeholders to ensure that the close company gateway was appropriately targeted. The Government announced that the charges on outstanding loans and the disguised remuneration rules for self-employed individuals would go ahead as planned from 6 April 2017. In the context of changes to anti-avoidance rules and in particular changes which strengthened those rules, the decision to legislate part of the changes at a later date after further consultation is to be welcomed and recognise the complexity of the proposals.

9. Tackling Tax Evasion: the new corporate offence of failure to prevent the criminal facilitation of tax evasion ("FTP") - The new offence of failure to prevent criminal facilitation of tax evasion was enacted on 27 April 2017 as part of the Criminal Finances Act 2017. There was an introductory consultation between July 2015 and October 2015. The summary of responses and the draft legislation was published in December 2015, a further more detailed consultation on the charge together with revised legislation was published in April 2016, the consultation finishing in July 2016. Draft guidance and the legislation was published in October 2016. Revised guidance was published in September 2017 when the offence came into force.

   We consider this was a good example of process. The standard ought to be higher in our view for criminal legislation than for processes relating to ordinary taxation provisions within the Finance Bill timetable; in addition the obligation to prepare and publish guidance is enshrined in the statute. Having said this, the implementation of the FTP legislation was well organised because of the development of the guidance alongside the legislation which enabled taxpayers to consider how they would prepare for the new rules prior to their enactment so that they could be prepared prior to the legislation coming into force.

10. Enablers - The legislative history of the enablers provisions (contained in Schedule 16 Finance (No.2) Act 2017) commenced with the announcement of the proposal at the 2016 Budget. There then followed a limited consultation between 17 August 2015 and 12 October 2016.

    This consultation period was too short and during the holiday period. The consultation itself was poorly developed and targeted seeking to charge all advisers involved in transaction which failed with penalties possibly based on the tax proposed to be avoided. The provisions were extremely controversial in relation to their scope and how they were targeted, producing potential conflicts of interest for professionals.

    The provisions were subsequently introduced in the original Finance Bill 2017 and finally legislated for in the second Finance Act 2017 as referred to above. For provisions which were so controversial there was no second or further consultation on the rules, but a series of discussions with representative bodies. The final result, although far better than the initial position may still have adverse effect outside the area which it is considered the rules are intended to target, for example second opinions provided by advisers on structures may be harder to obtain following the enactment of these provisions. We do not consider this to be a good example of legislative process.

APPENDIX 3

Recommendations to changes to the Protocol

The second report of the Forum recommended change to the Protocol. These changes have not been made and we remain at the view that these should be introduced. The full text of this section from the Second Report is included below.

> "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 any of the following cases:
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> - 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."