

Tax Professionals Forum
Independent Annual Report
6 December 2011

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Foreword by the Exchequer Secretary to the Treasury

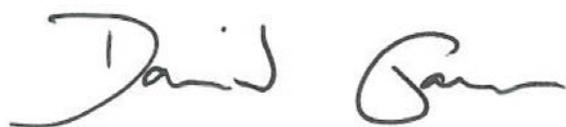
At the June Budget 2010, I launched a discussion on the way in which the Government makes tax policy.¹ In December 2010, following consultation on the key proposals, the Government set out its new approach to tax policy making.²

To restore the UK tax system's reputation for predictability, stability and simplicity, we have adopted a more considered, deliberative approach, with consultation on policy design and scrutiny of draft legislation as the cornerstones.

To inform the development of the new approach, and to oversee its implementation, in July 2010 I established the Tax Professionals Forum.³ The independent members of the forum each possess a wealth of experience of tax matters and they have provided a valuable external perspective to our discussions on tax policy making.

This report represents the independent members of the forum's assessment of the Government's progress in adopting the new approach. I believe they have delivered a report that is fair and balanced. It highlights some areas where we have done particularly well and suggests areas where we might wish to improve. In particular, the forum supports the framework of the new approach as a more sensible and thoughtful way to make tax policy, and that we have made good progress towards implementing this.

I would like to take this opportunity to thank the independent members of the forum, not only for this report, but also for their constructive engagement since the forum was established in 2010.

A handwritten signature in black ink, appearing to read 'David Gauke'.

David Gauke MP

¹ *Tax policy making: a new approach*, HM Treasury and HM Revenue & Customs (HMRC), June 2010.

² *The new approach to tax policy making: a response to the consultation*, HM Treasury and HMRC, December 2010.

³ See www.hm-treasury.gov.uk/tax_forums_tax_professionals.htm.

Executive Summary

The independent members of HM Treasury's Tax Professionals Forum welcome the stated ambitions of the Coalition Government to improve the tax policy making process. We consider that the targets of greater stability, predictability and effective consultation enshrined in the Treasury's "Tax Policy Making: A New Approach" document are both appropriate and achievable.

As part of the Forum's remit to consider the development, communication and implementation of tax policy changes, the independent members have monitored progress from these perspectives. We have provided input to HM Treasury and HM Revenue & Customs (HMRC) in meetings and have also provided comments upon areas of particular concern.

This Report sets out a high level summary of the independent members' analysis of the progress of HM Treasury and HMRC in meeting the stated aims for improved tax policy development. Furthermore, we seek to make constructive input as to how the new tax policy process can be further improved.

In our view, the broad components of an improved new policy framework have properly been identified as including; clear communication of policy objectives by HM Treasury/HMRC; an authentic consultation process in which taxpayers and their advisors can contribute; advance publication of draft legislation enabling further consultation to take place; and, finally, the continuing need for effective Parliamentary scrutiny.

We welcome the fact that a start has been made to put these components on a more formal footing. We consider, however, that the extent to which the implementation of particular tax policy has met these criteria has varied in practice to date.

The publication of a tax consultation framework has provided a welcome increase in the clarity of consultation as each consultation document has explained the stage at which it is being launched. Furthermore the publication of a running schedule for ongoing consultations is certainly helpful.

However, this represents only a step towards greater clarity. There have been examples of consultations where we consider that the policy drivers behind the consultation have not been set out with sufficient clarity: the disguised remuneration legislation is the prime example.

We also consider that consultation would have been appropriate regarding the change affecting the oil and gas supplementary charge as this was not simply a rate change.

Counteracting wholly artificial arrangements designed to reduce tax liabilities on employment income is clearly a legitimate policy objective.

The difficulties in articulating the scope of this policy objective, however, have, on occasions, led to unwarranted concerns that normal commercial arrangements could be adversely affected. So far as the disguised remuneration legislation is concerned, we consider that the outcome of this process is an unduly cumbersome, lengthy and obscure addition to the UK tax code.

In other areas, however, the new policy process appears to be working well. Notably, the delivery of the Corporate Tax Road Map has received a broad level of support. The packages of corporate tax reforms implemented to date are generally considered to be both workable and broadly aligned with stated policy objectives.

We acknowledge that the aim of greater tax certainty must be considered in the context of the Government's understandable imperative to prevent unacceptable tax avoidance. The stated aim of "making the most of opportunities to make the tax system more watertight against avoidance" is entirely appropriate.

The increased clarity of the consultation process, exemplified by the comprehensive overview of measures and access to detailed supporting information on HM Treasury and HMRC websites, is also very welcome. We believe that many of the consultation exercises were positive examples of the new process where the legitimate concerns of taxpayers and their advisers were acknowledged leading to improved legislation; for example, the measures on pension reform and on corporate capital gains.

Some initial progress has been made towards achieving tax simplification and the *Office of Tax Simplification* has made a valid contribution in this area. Perhaps inevitably but nevertheless regrettably, the sheer bulk of the UK tax legislation has continued to expand. Sustained improvement in this area will require further commitment from the Treasury to ensure that simplification remains a key objective on the tax policy agenda.

The independent members trust that this Report contains helpful feedback to HM Treasury and HMRC and assists the Government in the process of tax policy making, thereby ensuring that tax reforms are increasingly responsive to the needs of taxpayers.

Section 1: Introduction

On 16 July 2010 the Exchequer Secretary, David Gauke MP, officially launched the Tax Professionals Forum ('TPF') stating:

"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."

To support this commitment to reforming the framework for developing tax policy and making tax law, an oversight forum of tax professionals was set up, chaired by the Exchequer Secretary. The public announcement of the establishment of the TPF is set out at Appendix A.

The remit of the Forum is to support the Exchequer Secretary, HM Treasury and HMRC in identifying improvements to the way in which the Government makes tax policy, rather than providing a forum for debating specific policy issues. Its remit includes consideration of the way in which:

- policy is developed;
- policy and changes in policy are communicated; and
- policy is legislated and implemented.

The Forum provides oversight on tax changes e.g. monitoring the correct use of the Protocol on unscheduled announcements of changes in tax law as published in the Treasury consultation paper 'Tackling tax avoidance' in March 2011 (attached at Appendix B). It also comments more generally on the process of changes to tax law and practice, with recommendations for improvement where appropriate.

The Forum is a new venture and the role that it is to play is developing. This first Report focuses on a review ex post of the implementation of the Government's strategy on the formulation of tax policy.

Section 2: Our appraisal of the consistency of tax policy with the Coalition Government’s overarching tax policy framework

A driver behind the publication of the “New Approach to Tax Policy Making” and the establishment of the Forum is to set a new direction to that pursued in the past. Past approaches raised a number of concerns:

- a lack of clear strategy for the tax system;
- consulting too late in the policy development cycle;
- length and complexity of the tax code;
- uncertainty due to the volume and timing of tax changes; and,
- inadequate Parliamentary scrutiny of tax legislation.

Given this backdrop, this section looks at the challenges that the new approach delivers to government and considers how to evaluate its success. The principles discussed in this section and the challenges they present are explored in more detail in subsequent sections.

The need for action

As set out in “Tax Policy Making: A New Approach”, the Government perceived a clear loss of faith in the tax policy making process. This was considered to be driven by a number of distinct causes.

Constant change: lack of stability

The length of the annual Finance Bill seemed to be increasing year on year. This delivered a feeling of the tax system being in constant flux and concerns that the tax system was being used to micro-manage the economy, providing complex incentives to which taxpayers were unable to respond.

Lack of predictability

The perception of constant change to the tax system was exacerbated by the lack of predictability of that change. An example was the short lived zero percent corporation rate for very small companies.

Inadequate and poorly designed consultation

Previous governments launched some intense periods of consultation, but the scope and rationale behind specific consultations was not always clear. Concern that government was merely ‘going through the motions’ of consultation was creating ‘consultation fatigue’ and possible disengagement by taxpayers.

The various changes during the last Parliament to the legislation for the taxation of non-domiciled UK tax resident individuals demonstrated that if policy is determined without sufficient consultation and, if draft legislation is

put forward which goes beyond the mischief to be remedied, the result is likely to be a set of legislative patches which do little to reassure taxpayers or enhance the reputation of the UK.

The new approach

The “New Approach” aims to address these concerns and we consider that the Government has initiated and delivered some positive changes.

Predictability

To promote greater predictability the Government has committed to set out its objectives for major areas of tax reform. Focusing upon the corporate tax arena, the delivery of a “Corporate Tax Road Map” as part of the Government’s corporate tax reform paper in November 2010 was a clear attempt to provide such predictability. The previous framework was set out in 2001 and the fiscal environment has changed significantly since then.

Looking more widely, the Emergency Budget in June 2010 included a target that banking taxes should generate “maximum sustainable revenues” from the banking sector and this represented a clear statement of policy that can be understood by taxpayers.

Stability

This is an aspect that only be judged over time, and we shall comment on this more in future reports.

Consultation

An area of positive movement is the willingness to consult on legislation targeting tax avoidance whenever possible.

There are, however, areas and examples where stability and predictability have not entirely been sufficiently achieved and circumstances where its delivery has proved to be challenging.

Anti-avoidance

The key example of this was the Disguised Remuneration legislation where the scope of the legislation was insufficiently articulated in areas such as employee related payments and benefits provided by third parties. The initial draft legislation caused significant concerns because the apparent scope went far beyond the anti-avoidance cases which it was thought that HMRC had in mind (and which were mentioned on the publication of the draft legislation on 9 December 2010). The legislation was subsequently altered through the insertion of a considerable number of amending provisions.

Whilst these produced safe havens for some transactions, there are many routine transactions whose treatment remains uncertain or which have to be structured in an excessively complex manner to prevent unintended tax charges arising.

A further example of difficulties was the change to the corporation tax de-grouping charges. There had been a consultation on de-grouping charges indicating a number of well publicised changes to this legislation. Even having gone through the extensive consultation, the 2011 Finance Bill as introduced to Parliament included a provision countering a particular tax avoidance scheme (following a DOTAS disclosure) which would have, in certain circumstances, created new issues with de-grouping charges between connected groups. A satisfactory solution was achieved following representations to HMRC.

These areas are discussed in more detail in Section 6.

Consultation on tax rates

A recent example was the announcement of the substantial change in the rate of the Supplementary Charge affecting companies operating in the North Sea. This came as a surprise to the industry, particularly as the industry believed that specific assurances had been given that there would be stability in the oil and gas tax regime.

Hence, in narrow circumstances, it might be appropriate to consult upon the possible impact of changing the rates of tax in areas that have a specific impact upon particular sectors. The Supplementary Charge is a special case because of the proposed link to oil prices and the interaction with field allowance. Other examples might include insurance premium tax and landfill tax but we appreciate that this approach is unlikely to be applicable to, for example, the main rates of income tax and national insurance

Development of the new tax policy framework

The development of the new tax policy framework has assisted in delivering a more coherent approach to the development and implementation of tax policy changes. Whilst there is always scope for improvement and the process in some areas could have been better managed, we consider that the overall direction is positive. This Report considers the lessons to date and what we can learn from them in the future.

The remainder of this Report focuses in particular on:

- the delivery of the new framework for scrutiny of tax legislation;
- the implementation of stated anti-avoidance strategy;
- the progress to date on tax simplification; and
- selected individual 2010/11 consultative processes.

Section 3: The delivery of the new framework for scrutiny of tax legislation

The tax consultation framework sets out five stages for the development and implementation of tax policy.

Stage 1	Setting out objectives and identifying options.
Stage 2	Determining the best option and developing a framework for implementation including detailed policy design.
Stage 3	Drafting legislation to effect the proposed change.
Stage 4	Implementing and monitoring the change.
Stage 5	Reviewing and evaluating the change.

Proper scrutiny of tax legislation also requires parliamentary review and this is discussed below.

The timetable for the development and implementation of tax policy

It is, of course, essential that there should be enough time to scrutinise legislation. The new timetable is designed to facilitate this. In particular, detailed scrutiny of draft legislation will follow its publication early in December each year. However, although the timetable permits it, the Stage 2 detailed policy development discussion has been variable.

This was the first year of operation but the resulting draft legislation ought to have rested on a better foundation of detailed policy design. The Disguised Remuneration legislation suffered in particular from a failure to move from the broad policy intention, through detailed policy principles to the resulting draft legislation. Accordingly, the draft legislation inadvertently caught many normal commercial arrangements. The result was an 'eleventh hour' rush to exclude those arrangements.

While the change to the oil and gas supplementary charge was principally a rate change, the link to oil prices was a new feature which increases complexity and uncertainty and by its nature the provision was carefully targeted on a particular sector. In these circumstances, we consider that consultation should have occurred.

Nevertheless, we consider that the approach adopted for most of the measures in the Finance Act 2011 complied with that outlined in the New Approach to Policy Making. In particular the corporate tax reform package and the measures relating to tax relief on pensions were excellent illustrations of best practice in the conduct of the policy process.

Process issues arising from the new consultation conventions

The new convention provides that, save in the case of anti-avoidance legislation, the general intention is that draft legislation will be published at least three months before the start of the tax year to which it relates. The general cycle for tax legislation involves an annual Budget in March, announcing legislation which is usually enacted, subject to Parliamentary scrutiny and amendment, in July. Prior to March, officials will be involved with the legislation for the Finance Bill, doubtless considering consultation responses received following the publication of the draft legislation the previous December. Consultations for projects which may lead to draft legislation being published the following December are launched after the Budget, sometimes as late as July. This breadth of publication dates of consultations is in response to requests to spread the workload in responding to consultations.

If a consultation is published in June or July there will normally be twelve weeks for taxpayers to respond. In order to have the draft legislation ready for publication the following December, however, Parliamentary draughtsman will typically have been instructed over the summer, broadly at the same time as the consultation paper is being put to taxpayers for comment. It is early days for the new style consultation process, and there are undoubted benefits from the publication of draft legislation in December prior to its enactment the following year but there are some issues mentioned below that may fall for consideration and monitoring in future years.

Setting out the underlying policy behind legislation and the provision of as much detail behind its intended scope, exemptions and definitions at the earliest opportunity would allow taxpayers to voice any concerns about unintended side effects. This might also produce greater efficiency in instructing Parliamentary draughtsman and reduce the need for substantive redrafting the following February and March when the main policy direction may have been set. This underlines the need to develop the policy with as much clarity as possible at an early stage.

Where a consultation relates to a significant change to the tax system, the process may need to be started earlier and a longer cycle of consultation may be needed to minimise last minute revisions or the enacted legislation requiring subsequent amendment. This has been noted in the new approach. Where the change affects the UK internationally or at a competitive level, this is particularly the case. Once draft legislation is published it may be too late for the basic structure to be changed.

Section 4: Our view of the implementation of stated anti-avoidance strategy

Introduction

The Coalition Agreement published on 20 May 2010 referred to certain specific areas of anti-avoidance and it included the statement

“We will make every effort to tackle tax avoidance...”

This was developed further by HM Treasury in ‘Tax policy making – a new approach’ published in June 2010 which set out key policy approaches to tackle tax avoidance and included the following section on the strategic policy objectives:

“Its approach will be to:

- build in sustainable defences against avoidance opportunities when undertaking policy reform, for example, through legislative approaches that clearly set out the intended objectives;*
- review areas of the tax system in which repeated changes have been necessary to close loopholes and seek to strengthen the legislative framework;*
- consider, against the background of developing more sustainable defences, whether a General Anti Avoidance Rule (GAAR) should form one element of strengthened defences. Recognising the range of views on the implications of a GAAR, HMRC will engage informally with interested parties over the summer to explore whether there is a case for developing a UK GAAR, taking into account other planned changes, such as corporate tax reform; and*
- look critically at the need to announce legislative changes taking immediate effect outside fiscal events and develop a clear protocol for the circumstances in which the Government would be willing to make such announcements. It will work with interested parties in developing this protocol.”*

On Budget Day 2011 HM Treasury published a specific paper, ‘Tackling Tax Avoidance’. This followed feedback on the proposed strategy and a commitment to strengthening HMRC’s resources in this area through investment of over £900 million under the Spending Review. HMRC predict that these additional resources should increase tax revenues by £7 billion per year by 2014-15.

The paper refined the policy objectives as follows:

- *making the most of opportunities to make the tax system more watertight against avoidance, for example, as part of wider policy reform;*
- *reviewing areas of the tax system that have been under repeated avoidance attack, to get to the heart of the problem and develop sustainable solutions; and*
- *creating new generic defences against avoidance, going beyond closing identified avoidance loopholes, including considering the case for a General Anti-Avoidance Rule ('GAAR').*

This section of our Report comments on the progress to date against the stated policy objectives.

Progress toward objectives outlined in 'Tackling Tax Avoidance'

We welcome the mapping out in 'Tackling Tax Avoidance' of the Government's overall strategy for tackling tax avoidance through to 2014/15. In the foreword, the Exchequer Secretary identifies the tax avoidance element of the estimated £40 billion 'tax gap' as approximately £6.7 billion a year. With the implementation of the strategy HMRC will anticipate collecting an additional £7 billion in revenues a year by 2014/15.

At this stage it is too early in the process to reach any conclusion on the success of the strategy. However, we consider it appropriate to make a number of initial observations on the ideas set out.

The Tackling Tax Avoidance document is split into four chapters:

1) The strategic approach in practice

This chapter covers the steps that HMRC will (and has been) undertaking to implement its core strategy objectives of prevention, detection and counteraction.

2) Tackling avoidance at the root

The measures covered in this chapter are still in the early stages and the results of the study group considering the case for a GAAR is expected to complete its work in November 2011. However, as promised, HMRC has published at the end of June 2011 its consultation on high risk avoidance areas (income tax losses and Unauthorised Unit Trusts).

3) Tackling avoidance through challenge and litigation

This section covers in more detail how HMRC is developing the various strands of its strategy to deliver a change in the mindset of the minority of taxpayers who are involved in aggressive tax avoidance schemes.

4) Protocol on unscheduled announcements of changes to tax law

The Protocol has been updated following consultation and can be found in Appendix B.

Since the final protocol was published at Budget 2011, three unscheduled announcements have been made. One was made on 6 April 2011 to tackle tax avoidance in relation to overseas pensions, another on 12 August 2011 on capital allowance anti-avoidance changes and the final was made on 15 September 2011 to block tax avoidance involving Manufactured Overseas Dividends. These were all aligned with this new Protocol. However, there was no quantification of the risk to the Exchequer which should have been included in the announcement.

Missing element

We believe that further discussion should have been included in 'Tackling Tax Avoidance' on the interaction of the anti-avoidance strategy with developments in European case law. On a number of occasions UK anti-avoidance legislation has been challenged in the European Court of Justice and in some cases overturned by the decisions of the Court. We consider that HM Treasury/HMRC should recognise and discuss the European dimension more explicitly in the consideration of policy designed to counter anti-avoidance activities. The CFC consultation, for example, makes steps towards addressing these concerns by including an appendix outlining the impact of EU law. We think this is a useful precedent to follow.

Section 5: Observations upon the progress to date on tax simplification

HM Treasury has placed tax simplification high on the fiscal policy agenda of the Coalition Government.

It is one of the four principles for corporate tax reform set out in the November 2010 Treasury paper “Corporate Tax Reform: delivering a more competitive system”. This set ambitious aims as follows:

“Avoiding complexity – The Government considers simplicity to be a feature of good tax policy. However, complexity in how businesses operate and the diversity of the business population will mean some complexity in the corporate tax system is unavoidable. In bringing forward reforms, the Government will seek to avoid complexity where it can.”

We consider that this aim is both appropriate and important and we believe that the overwhelming majority of both professional tax advisers and their clients will share that view.

Simplification can be approached in several ways by:

- reducing the number of taxes, particularly overlapping taxes;
- removing redundant measures, both reliefs and anti-avoidance measures;
- rewriting legislation; and,
- simplifying administration and compliance.

Each of these merits proper consideration in seeking to simplify the UK tax system.

Office of Tax Simplification (‘OTS’)

The establishment of the OTS by the Chancellor and the Exchequer Secretary in July 2010 was a welcome statement of the commitment by the incoming Treasury team towards the goal of simplification. The Office of Tax Simplification Framework Document sets out the remit as being to:

- *“provide the Government with independent advice on where there are areas of complexity within the UK tax system with the potential for simplification; and*
- *conduct inquiries into complex areas of the tax system, to collect evidence and advise the Government on options for reform.”*

The OTS paper “Review of Tax Reliefs” embodied this approach, described within the Chairman’s Forward as, “the start of the journey towards the simplification of the UK’s tax system”. A total of 1,042 separate tax reliefs

were catalogued of which 155 were examined in detail. The review recommended that 54 reliefs remain unchanged, 37 be looked at in more detail, 47 be abolished and 17 be simplified. In response, the Government has signalled its agreement to abolish 43 reliefs. In our view, this has been a useful but limited exercise which highlights both the scale of the problem and the difficulty in identifying tax reforms which can easily be implemented without undertaking more fundamental reform.

Similarly, we consider that the suite of reviews focusing on small business taxation, issued by the OTS, to represent a welcome contribution to the cause of simplification which should represent valuable groundwork that will assist the Treasury evaluate options in this area.

It is clear to us that the OTS can only be one strand to achieving real tax simplification. The prime responsibility must rest with Government.

Section 6: Comments on selected individual 2010/11 consultative processes

This section considers in detail a number of particular areas of consultation.

Simplification consultations

Corporate capital gains simplification

The explanatory notes to the Finance Bill 2011 summarised the following measures which emerged from a detailed consultation process.

- *remove some existing restrictions on the use of capital losses within a group of companies after acquisition of a business;*
- *replace a complex set of anti-avoidance rules with a clearer purpose-based rule; and*
- *modernise the degrouping charge rules, in particular how they interact with the substantial shareholdings exemption, which will make it easier for companies to plan acquisitions and disposals of group companies.”*

In our view, the outcome of this process has, on balance, been successful in reducing the complexity of tax legislation in these areas. The new provisions have improved the underlying law while ensuring that corporate capital gains are taxed on an appropriate basis without the same burdensome compliance obligations.

Pension Reforms

In our view, the reforms in the annual allowance and method of relief for qualifying pension contributions which have been implemented from 2011/12 onwards demonstrate that simpler alternatives can be designed within the same revenue cost constraints to replace more complex rules, for example, the abolition of the complex rules to claw back tax relief for pension contributions by individuals earning more than broadly £150,000.

Whilst a number of amendments were made to the original proposals, this is understandable given the inherent complexities within the pension tax system, the outcome represents, within the stated policy objectives, a less complex system which will be more straightforward for individuals to understand and for HMRC to check.

Anti-avoidance consultations

Tainted Charity Donations

The approach adopted in introducing this legislation provides an opportunity to assess how well the new tax avoidance policy objectives can work. Tainted charity donations is a relatively distinct area where the new policy was used to produce legislation that replaces 2006 legislation which was heavily criticised for not being appropriately targeted and for being unresponsive to the needs of charities and taxpayers. A key factor in this criticism was a failure to engage in a sufficiently broad based discussion with the charity sector and its advisers over the proposed new rules, either conceptually or in terms of detailed drafting.

HMRC clearly took on board the criticism and, in accordance with the consultative approach envisaged by 'Tax policy making – a new approach', sought views from interested parties as to how the legislation might be amended to achieve the desired policy of stopping so-called tainted donations in a simpler, better targeted way. To that end informal consultation on draft clauses took place with a key group of stakeholders in October/November 2010.

This experience illustrates the point that it is, on occasions, difficult for HMRC to understand the full implications of sweeping anti-avoidance legislation in specialist areas such as the charity sector where the organisations and activities are inevitably diverse. In such cases it can be particularly important to seek wide-ranging views from the sector concerned. The involvement of representatives of the whole sector as a precursor to the introduction of new legislation has, in our view, contributed to a successful outcome. Care is required, however, in conducting informal consultation. Such consultation is selective and necessarily excludes organisations, interested parties and specialists whose views cannot therefore be taken into account and which may lead to issues being overlooked.

Overall, we consider that the process through to the publication of draft legislation in December 2010 and again at the time of the 2011 Budget provided sufficient opportunity for feedback from all interested parties on potential areas of difficulty. Accordingly, we are satisfied that the process leading to the enactment of the new legislation met the Coalition Government's stated policy objectives.

Group Mismatch Schemes (GMS)

The stated HM Treasury/HMRC objectives of the GMS consultation process, from the outset, were to

- *consult on the possibility of introducing a 'principles-based' rule to counter GMSs,*
- *debate HMRC's initial ideas on the form and scope of any generic GMS legislation,*
- *consider the repeal or simplification of overlapping anti-avoidance provisions and, if possible, and*
- *introduce new generic GMS anti-avoidance legislation in Finance Bill 2011.*

In conjunction with this process, HMRC stated that targeted measures would continue to be introduced to counter newly notified GMSs.

The draft legislation was circulated just ahead (on 6 December 2010) of the main clauses to be included in Finance Bill 2011 which were published on 9 December 2010. We are unclear why it was thought necessary or helpful to publish these sections of the draft Bill three days ahead of the other legislation given the stated intention to minimise piecemeal announcements of policy.

This will, unfortunately, remain a complex area of tax legislation where it is likely that there will have to be continuing consultation between HM Treasury/HMRC and interested parties. Our experience of the process for introduction of the legislation was overall positive. There were meetings with companies and their advisers. The policy objectives were clearly stated and there was sufficient clarity in the message to corporate taxpayers and professional advisers alike, that most financial structures resulting in GMSs are regarded by HM Treasury/HMRC as unacceptable/abusive tax planning and that every effort will be made to counteract them.

The HM Treasury/HMRC speakers at the July 2010 open day were knowledgeable about the subject matter. They made clear, informed presentations and were willing to field questions from the floor. This approach facilitated an open engagement between the speakers and the attendees and an informed debate ensued.

The resulting legislation is broadly 'principles based' with checks to narrow the drafting of the generic anti-avoidance rules, which could otherwise catch routine / inoffensive financing arrangements. Whilst it remains to be seen if additional changes may be required to reflect practical matters arising from applying the legislation, we consider that the process overall was properly managed.

Tax Treaty Avoidance (TTA)

By contrast, the now withdrawn technical note published at the start of August on TTA illustrates the importance of following the new tax policy process even with proposals designed to combat tax avoidance. The note on TTA gave virtually no clue as to its target or the impact of avoidance activities using treaties. There was a failure to consult on the policy objectives; the draft legislation appeared far too broad, and potentially impacted on commercially motivated structures already in place.

Fortunately these flaws were recognised and the note quickly withdrawn, demonstrating the Government's commitment to its new tax policy process.

Disguised remuneration

The 'Disguised Remuneration' legislation illustrates that there is still more to do in terms of improving the process. The final output is undeniably complicated. The legislation takes up some sixty pages of the Finance Act 2011 but the issue is not just about quantity, it is about the quality of the consultative process.

A brief history

The Chancellor announced in his Emergency Budget in June 2010 that legislation would be introduced to tackle arrangements used to reward employees which contrived to avoid, reduce or defer tax liabilities. The use of employee benefit trusts and Employer-Financed Retirement Benefits Schemes (EFRBS) to reward employees was not a new phenomenon and HMRC had previously set out on their website their views on certain uses of such structures. While we do not dispute the need for steps to prevent abuse in this area, we think that the manner in which the proposals were taken forward was clearly inadequate and did not meet the standards required for the new tax policy process.

Draft legislation was first released on 9 December 2010, along with a supplementary explanatory note that set out the policy objective. Interested parties were encouraged to comment; however, a formal consultation process was never initiated.

Following initial comments that the proposed measures were far too draconian with regards to their potential impact on many commercially driven remuneration packages, the legislation was the subject of a large number of amendments. Broadly, these changes inserted several additional exceptions to the application of the rules, adding further layers to the already convoluted legislation, rather than revisiting the core rules.

Comments on the consultation process

As the Government now recognises, the first stage in the 'development and implementation' of any new tax policy should be devoted to setting out of objectives and identifying possible options to achieve these. Unfortunately, the policy purpose of the Disguised Remuneration rules was not made clear at the outset. The legislation was subsequently drafted in a very broad fashion, arguably, because the policy objectives were never specifically identified.

On the positive side, there were a number of meetings during the consultation process to seek views. Nevertheless, various attendees noted that initially much HMRC time appeared to be spent finalising FAQs to explain the draft legislation rather than testing the soundness of the underlying rules.

In the end, after some delay, there were some welcome changes, leading to some ninety amendments to the legislation in the course of its progress through Parliament. Although these amendments recognised many of the issues that had been raised in consultation, the need for such extensive amendment highlights the shortcomings of the process leading to the introduction of legislation in the Finance Bill. As a result the legislation had to be amended by inserting a series of exceptions, rather than addressing the overarching structure of the legislation.

Overall we consider that this area highlights that a properly targeted approach, in line with the consultation framework, would have resulted in more focused legislation being enacted.

Fundamental consultations

Controlled Foreign Company (CFC) reform

For international businesses, the reform of the CFC legislation is of particular significance and is regarded as a key step in achieving the objective of making the UK more business friendly. At the time of writing, the outcome of this consultation process is still awaited so it is not possible to express a conclusion on how successful the process has been.

Discussions relating to the reform of the CFC rules have continued for a number of years but the current consultation could be regarded as starting with the enactment of interim improvements in the Finance Act 2011 and the initiation of a formal consultation on more comprehensive reform. This process began well with a reasonably clear articulation of the policy objectives. Throughout the process, there has been detailed and constructive dialogue between government and industry aimed at achieving the policy objective and reducing unnecessary administrative burdens upon business.

The release of the consultation document on 28 June 2011 did create some concern. The regime outlined appeared complex and restrictive and was considered by many to have the potential to create a heavier compliance burden than the existing regime. The document was useful, however, in setting out where HM Treasury/HMRC's thinking stood and early indications are that the concerns expressed by the business community seem mainly to have been taken on board.

Appendix A – 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.

Appendix B – Protocol on unscheduled announcements of changes in tax law

HM Treasury and HM Revenue & Customs – March 2011

The Government has made clear its aim to strike the right balance between restoring the UK tax system's reputation for predictability, stability and simplicity and preserving its ability to protect the Exchequer by making changes where necessary. In particular, changes to tax legislation where the change takes effect from a date earlier than the date of announcement will be wholly exceptional.

1. Ministers undertake to observe the following criteria when considering a change to tax law which will:
 - a. be announced other than at Budget; and
 - b. take effect before the legislation implementing the change is enacted.
2. Such changes to tax law will normally only be announced other than at Budget where:
 - a. there would otherwise be a significant risk to the Exchequer;
 - b. significant new information has emerged to identify the risk or indicate its scale; and
 - c. changing the law immediately is expected to prevent significant losses to the Exchequer.

Announcements will usually take the form of a Written Ministerial Statement to Parliament before 2pm.

3. Legislative changes announced in this way will be confined to addressing the risk to the Exchequer that has been identified. A change in HMRC's interpretation of the law (unless prompted by a Court ruling) will not be regarded as 'significant new information'.
4. Where Ministers believe that such a change is justified, the process will be as follows:
 - a. a Minister will make a public announcement of the intention to change the law and make clear that the change will take effect before the legislation is enacted;
 - b. the public announcement will be accompanied by the technical detail necessary to amount to a sufficiently clear warning of the nature of the change and its timing;
 - c. HM Revenue & Customs (HMRC) will publish the Written Ministerial Statement and draft clauses on the HMRC website as soon as

practicable after the announcement to Parliament. If, exceptionally, draft clauses cannot be published on the day of the announcement, a detailed technical note explaining the nature of the proposed change and the reasons for it will accompany the announcement; and

- d. legislation to give the measure effect will be included in the next available Finance Bill.
5. Whilst the Government will not invite comment on the intention to legislate, the nature of the change or on its timing, it will consult after the announcement to establish whether the draft legislation would achieve its objective and change the law as intended. Subject to the risk of forestalling, consideration will be given to consulting informally in confidence before an announcement is made.
6. As part of the normal Budget process, the Office for Budget Responsibility will scrutinise the estimates of Exchequer impact associated with any change to tax policy.

To ensure that this undertaking is put into practice effectively, the Forum of Tax Professionals will review announcements as a standing agenda item at its regular meetings and provide Ministers with a view on how the Protocol is being observed in practice. The Forum may recommend changes to the Protocol.