



# Association of Accounting Technicians response to Improving large business tax compliance

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## 1. Introduction

- 1.1. The Association of Accounting Technicians (AAT) is pleased to have the opportunity to respond to the consultation paper “Improving large business tax compliance (condoc), which was released on 22 July 2015.
- 1.2. AAT is submitting this response on behalf of our membership and from the wider public benefit of achieving sound and effective administration of taxes.
- 1.3. AAT has added comment in order to add value or highlight aspects that need to be considered further.
- 1.4. AAT has focussed on the operational elements of the proposals and has provided opinion on the practicalities in implementing the measures outlined.

## 2. Executive summary

- 2.1. In the summer Budget the Chancellor confirmed the government’s intention to consult on the following measures (see (i) – (iii), below) with the intention to combat the small number of large businesses which continue to adopt highly aggressive behaviours such as tax avoidance, aggressive tax planning and a persistent refusal to cooperate fully with HMRC.
  - (i) A legislative requirement for large businesses to publish their tax strategy
  - (ii) A voluntary ‘Code of Practice on Taxation for Large Business’, which sets out the behaviours which HMRC would expect from its large business customers and
  - (iii) A narrowly targeted ‘Special Measures’ regime to tackle the small number of large businesses that continually undertake aggressive tax planning, or persistently refuse to engage with HMRC in an open and collaborative manner.
- 2.2. AAT supports the above measures as explained in paragraphs 3.3 (tax strategy), 3.13 (voluntary code of practice) and 3.57 (special measures) below.
- 2.3. AAT considers that surcharges may constitute a more effective deterrent to businesses whose main concern is financial tax savings (3.48, below).
- 2.4. AAT does not consider the removal of the defence of “reasonable care” to be appropriate (3.52 to 3.56, below).
- 2.5. AAT strongly considers that the protection of a ruling from or appeal to an independent Tribunal or Court should be obtained before sanctions are applied (3.60, below).

## 3. AAT response to the consultation paper on Improving large business tax compliance

### Question 1.

**Do you agree that the threshold above (£200 million / £2 billion) is appropriate for these measures? What other thresholds might we use?**

- 3.1. AAT agrees that a threshold above £200 million is a reasonable level for Improving Large Business Compliance measures, which is the same as the threshold set in Schedule 46 Finance Act 2009 for qualifying companies to which the Senior Accounting Officer duties apply.

**Question 2.**

**Do you agree there should be a named individual at Executive Board level with accountability for a business's published tax strategy? If so, do you have any views on who should this be?**

- 3.2. AAT notes that, in an age of heightened public interest in respect of taxation governance, many large companies do publish their tax strategy in their Annual Report and Financial Statements as illustrated in 2.5 (conduc).
- 3.3. AAT agrees with the proposal to introduce legislation to require large businesses to publish their tax strategy (2.1, conduc) as it relates to or affects UK taxation and for a company to have a named individual with responsibility for such an action (2.1, conduc).
- 3.4. AAT considers that the Chief Financial Officer should be the responsible Executive Board member, and may be the same person who is named as Senior Accounting Officer for the purposes of Schedule 46 FA 2009.
- 3.5. AAT agrees that the requirement for board-level oversight echoes the existing Senior Accounting Officer regime, which provides assurance that a business has adequate tax accounting arrangements in place.

**Question 3.**

**Do you think the areas above are the right areas for a published tax strategy to include? If not, what other aspects of tax strategy are more relevant? Equally, what aspects do you think are less relevant?**

- 3.6. AAT agrees that the strategy format and content outlined in 2.28 (conduc) - overview of internal governance, approach to risk management, attitude to tax planning and appetite for risk in tax planning (do large businesses seek to work in accordance with the spirit, in addition to the letter, of the law), attitude to relationship with HMRC, whether the UK Group has a target effective tax rate (ETR), and the measures the business is taking to maintain or reach this target ETR - are appropriate areas for inclusion in a published tax strategy, and are not unreasonable as disclosure to this extent is made by a number of public companies.
- 3.7. AAT does not consider the requirements set out in 2.28 (conduc) to be unreasonably onerous on a large company and not out of line with the information already required to be filed by the Senior Accounting Officer - the 'certificate for commissioners' required under Paragraph 2 of Schedule 46.
- 3.8. AAT considers that the required detail of the tax strategy should be filed to HMRC with the Company Return.
- 3.9. AAT also considers that a very large company's report should clarify whether tax policies and objectives are approved at board level on a regular basis and indicate the level of tax planning, for example does the company only engage in reasonable tax planning aligned to its commercial activities and whether or not it engages in aggressive or abusive tax avoidance.

**Question 4.**

**Should the tax strategy be supported by publication of factual information on how it has been applied in practice? If so, what information would be most relevant to demonstrate the application of the strategy?**

- 3.10. AAT agrees that the tax strategy of a company of the size to which this consultation relates should be supported by the publication of factual information on how it has been applied in practice.
- 3.11. AAT considers that a large public company should be transparent to the extent that its shareholders and the public-at-large are aware of factual information in respect of its tax strategy.
- 3.12. AAT considers that the most relevant information to publish in order to demonstrate the application of the strategy would be the actual corporation tax paid and the effective cash-tax-rate. These figures could then be augmented by an explanation as to why they differ from the mainstream rate of corporation tax. If such detail is already found in the a company's annual reports as it already for some companies<sup>1</sup>.

**Question 5.**

**Do you think that businesses should be required to publish whether they are or are not a signatory to the 'Code of Practice on Taxation for Large Business' as part of this measure?**

- 3.13. AAT agrees that large public companies should be required to publish whether or not they are a signatory to the 'Code of Practice on Taxation for Large Business'.

**Question 6.**

**What is the right medium for publication of a tax strategy? Where do you think a business's tax strategy should be published?**

- 3.14. AAT considers that a statement or certificate disclosing a company's tax strategy should be submitted to HMRC at the time of filing the company's corporation tax return.
- 3.15. Moreover, AAT considers that the right medium for publication of a tax strategy would be the company's annual report and financial statement for the information of shareholders, the press and the public.

**Question 7.**

**What would you see as an effective sanction for non-publication? To whom should this apply?**

- 3.16. AAT agrees that a sanction modelled along the lines of the current HMRC Senior Accounting Officer regime would be appropriate, that is £5,000 under paragraph 5 Schedule 46 FA 2009 applicable to the named Senior Accounting Officer. The proposed sanction in the question would apply to the named individual as proposed in paragraph 3.4 (above).
- 3.17. AAT agrees HMRC's practice to take account of non-publication as part of their regular risk reviews.

**Question 8.**

**Do you agree that the openness and relationship behaviours contained within the Code of Practice are appropriate for large businesses? Are there any other behaviours you would expect to see?**

- 3.18. AAT agrees that the openness and relationship behaviours contained within the Code of Practice (Annex D, condoc) are appropriate for large businesses.

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<sup>1</sup> [Page 40 of United Utilities Group PLC Annual Report and Financial Statements for the year ended 31 March 2015](#)

- 3.19. AAT notes 3.2 (condoc) explains that a number of eminent commentators such as the OECD, the Confederation of British Industry, and 'Fair Tax Mark' have already offered guiding principles on the content of the Code of Practice.
- 3.20. AAT notes from the draft Code of Practice set out in Annex D how comprehensive this document is and has nothing to add to this.
- 3.21. AAT agrees that the Code provides a common set of principles to encourage all businesses to adopt the most positive tax compliance behaviours and which businesses themselves can use to promote exemplary behaviours across their organisation.

**Question 9.**

**Do you agree that the governance behaviours contained within the Code of Practice are appropriate for large businesses? Are there any other behaviours you would expect to see?**

- 3.22. AAT agrees that the governance behaviours contained within the code of practice and listed in Annex D (condoc) are appropriate for large businesses.
- 3.23. AAT suggests that consideration should be given to the inclusion of Alternative Dispute Resolution (ADR) in the paragraph (Openness and Relationship with HMRC) "Where disagreements over tax arise, proactively work with HMRC to seek to resolve all issues by agreement" before proceeding to Tribunal.
- 3.24. Apart from 3.23 above, AAT considers governance behaviours in the code of practice to be comprehensive and for the reasons stated at paragraphs 3.19 and 3.20 (above) there are no other behaviours that AAT would expect to see in the draft Code of Practice.

**Question 10.**

**Do you agree that the tax planning behaviour contained within the Code of Practice is appropriate for large businesses? Are there any other behaviours you would expect to see?**

- 3.25. AAT agrees that the tax planning behaviour contained within the code of practice is appropriate for large businesses.
- 3.26. For the reasons stated at paragraphs 3.19 and 3.20 (above) there are no other behaviours that AAT would expect to see in the draft Code of Practice.

**Question 11.**

**Do you agree with the initial/preliminary framework for entry into special measures? If not what framework do you think would be appropriate?**

- 3.27. AAT regards delays in payment of tax through intentional, aggressive and artificial tax planning as wholly inappropriate.
- 3.28. AAT also notes from 4.4 (condoc) that it is Government policy to introduce a special measures regime which would target the "small number of the very highest risk large businesses who persist with aggressive tax planning or uncooperative behaviours."
- 3.29. This question relates to the initial/preliminary framework for entry and AAT agrees that this should be based on specific risk-based and behavioural criteria.
- 3.30. AAT approves of the approach outlined in the initial notice period (4.19, condoc) whereby HMRC will engage with the business to discuss its concerns.
- 3.31. AAT agrees with the following significant tax risk-based criteria outlined at 4.15 (condoc): artificial, contrived or schemes with abnormal arrangements where a business's returns have been found to be inaccurate for a number of times due to their aggressive tax

planning within a specified period, the nature of these inaccuracies and whether the business has a recent history of such behaviour.

- 3.32. AAT further agrees that a reasonable criterion would be the time and effort required to establish an accurate view of the business's tax liabilities due to non-cooperation with enquiries such as the number of times formal information powers have been invoked in a specified period.
- 3.33. On the other hand AAT notes with some concern that HMRC will regard as an entry criterion the significant number of occasions in which a business has entered into tax avoidance schemes within a specified period whether or not they have been successful in avoiding tax. A large company with a number of separate businesses may take views on statute of which HMRC disapprove and to use the definition of tax avoidance at Annex C "a view ... which is contrary to the intentions of Parliament". Tax case law which forms the background of the Tax Code was formed by disputes where HMRC took a contrary view of the intentions of Parliament, some of the judgements on these being overturned by higher courts.
- 3.34. At the 'HMRC Open Day' (14 August 2015), a question was posed on the subject of 'Improving Large Business Tax Compliance' was "How can one know the intention of Parliament behind legislation?" it related to 3.20 (condoc) "the business should reasonably believe that transactions are structured in a way that gives a tax result which is not contrary to the intentions of Parliament."
- 3.35. In response to the question in paragraph 3.34 above, AAT considers the following advice from HMRC Appeals Handbook AH0605<sup>2</sup> may be helpful: "The House of Lords in *Pepper v Hart* (65TC421)<sup>3</sup>, held that it was appropriate, in certain circumstances, to have regard to proceedings in Parliament, as recorded in Hansard, as an aid to the construction of legislation."
- 3.36. Overall AAT generally agrees with HMRC initial/preliminary framework for entry into special measures.

#### **Question 12.**

**At what level should thresholds (number of schemes, number of information notices issued, tax at risk, etc.) be set?**

- 3.37. AAT notes the intention of 'Special Measures' at 4.5 (condoc), in particular that "this new regime will ensure that there are negative consequences for the very small number that persist with aggressive tax planning or uncooperative behaviours" by monitoring aspects similar to those monitored in HMRC 'Managing Serious Defaulters (MSD)' regime.
- 3.38. AAT recommends that the thresholds for 'Special Measures' should require independent identification of default, for example through a tribunal in a similar way to MSD regime's requirement of independent identification of default.
- 3.39. AAT notes at 4.15 (condoc) that the number of criteria for Special Measures will be set out in legislation and it is AAT recommendation that this should be similar to those required for MSD, in that there is an independent verification rather than unilateral selection by HMRC.
- 3.40. AAT recommends at least three failed aggressive tax planning incidences and failure to comply with at least three information notices.
- 3.41. AAT considers this number to be consistent with the 'persistent' maxim expressed in 4.9 (condoc) "where businesses do not respond and continue to persist with aggressive tax planning or uncooperative behaviours".

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<sup>2</sup> <http://www.hmrc.gov.uk/manuals/ahmanual/ah0605.htm>

<sup>3</sup> <http://www.hmrc.gov.uk/manuals/eimanual/eim21110.htm>

- 3.42. With regards ‘aggressive tax planning’ as referred to in 4.9 (condoc), AAT recommends that the Tribunal be asked, in failed cases, to express an opinion on whether the scheme “involves contrived, artificial transactions that serve little or no purpose other than to produce a tax advantage.”
- 3.43. With regard to the tax at risk, as in the case of large businesses, this will relate to the highest amounts of tax at risk to the Exchequer and, as such, AAT is not in a position to evaluate and express a figure, given 4.16 (condoc) “the size of the tax at risk ... excluding those cases where the low level of tax at risk means that the business (notwithstanding their behaviour) cannot reasonably be said to present a significant risk to the Exchequer.”

**Question 13.**

**Do you agree that HMRC should look back at a business’s recent behaviour when applying these criteria? If yes, to what extent (e.g. three years as in the ‘Promoters of Tax Avoidance Schemes’ regime)?**

- 3.44. Certainly HMRC should look at a business’s compliance record in applying these criteria
- 3.45. AAT agrees that, in looking back at a business’s recent behaviour when applying these criteria, 3 years is an appropriate time for the reasons set out in paragraph 3.40 (above).

**Question 14.**

**Is 12 months an appropriate notice period to allow businesses at risk of special measures to demonstrate a significant improvement in their behaviours and approach to tax planning? If not, what period would you propose?**

- 3.46. AAT considers that for reviewing improvement in a business’s behaviour 12 months might be not be long enough to demonstrate consistently improved behaviour and would recommend at least two years.

**Question 15.**

**Would introducing increased reporting and disclosure requirements for businesses who persistently refuse to engage with HMRC alter behaviour? If not, what other ways might we achieve this objective?**

- 3.47. AAT remains to be convinced that increased reporting will be a deterrent for very large companies who are likely to have an internal tax department and as acknowledged at 4.11 (condoc) “large businesses are more likely than other customer groups to engage in bespoke, non-disclosable avoidance schemes.”
- 3.48. AAT considers that, in response to the question ‘other ways to achieve this objective’, tax avoidance is about saving money and that the answer is more likely to be a surcharge as considered for serial tax avoiders in the January 2015 consultation “Strengthening sanction for tax avoidance”<sup>4</sup>.
- 3.49. For example, where a company can devise a tax avoidance scheme which may be expected to fail, but will postpone the due date on a HMRC issued assessment then this should be counterbalanced by a monetary surcharge to wipe out any monetary advantage of the planned delay strategy.

**Question 16.**

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<sup>4</sup> Para 3.4 [AAT response to Strengthening sanctions for tax avoidance](#)

**Would businesses behaviour be influenced by the withdrawal of certainty from those who refuse to work with HMRC in a transparent or collaborative way? If not, what other ways might we achieve this objective?**

- 3.50. Where businesses use a recklessly planned scheme which will be expected to fail in order to delay payment of tax, they will not be influenced by the withdrawal of certainty.
- 3.51. Furthermore, it would be reasonable for HMRC to withdraw from giving clearances to businesses who engage in persistent tax avoidance.

**Question 17.**

**Would removing the defence of “reasonable care” from businesses who repeatedly engage in unacceptable tax planning be successful in changing behaviours? If not, what other ways might we achieve this objective?**

- 3.52. AAT does not agree to the removal of the defence of “reasonable care” from businesses who repeatedly engage in unacceptable tax planning despite AAT’s abhorrence of the behaviour.
- 3.53. ‘Reasonable care’ is a basic legal right and a term that is in wider parlance than taxation, for example the definition of neglect in *Blyth v Birmingham Waterworks* and should not be removed for taxation. ‘Reasonable care’ is also one of the basic conditions for a penalty under Schedule 24, FA 2007.
- 3.54. Mindful that the onus is on the Appellant at tribunal to displace an assessment and AAT considers that it is for HMRC to build a robust support for their assessment or other action.
- 3.55. Of course, in penalty appeals the onus at tribunal is on the respondent (HMRC). HMRC’s submission would then be to the common sense and experience of the Tribunal to decide whether a business which repeatedly engaged in unacceptable tax planning can be said to have taken reasonable care in their tax affairs or reasonable care in trying to avoid tax. Certainly, where a decision by the GAAR Advisory Panel<sup>5</sup> is obtained (and it is the “very highest risk large businesses which persist with aggressive tax planning or uncooperative behaviours.” in 4.4 (conduc) to which this question relates) the defence of reasonable care may be expected to be much less sustainable at tribunal.
- 3.56. AAT has observed a trend developing in respect of the withdrawal of the defence of ‘reasonable care’ in recent legislation, for example ‘FA 2014 Section 276(2) withdraws this defence for Promoters, and as a consequence AAT is concerned that this might now be extended into general tax enquiries.

**Question 18.**

**Would businesses behaviour and approach to tax planning be influenced by public naming by HMRC as being subject to special measures? If not, what other ways might we achieve this objective?**

- 3.57. Taking into account that listed companies would be sensitive to naming and AAT considers that this would be an effective deterrent.
- 3.58. Mindful that there may be a very small number of large private companies or hedge funds who may not be affected by naming. AAT considers that financial sanctions will be the main deterrent to these businesses.

**Question 19.**

**Given the objectives of the ‘Special Measures’ regime are there any other sanctions that you think should be considered, either in addition to, or instead of, those described above?**

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<sup>5</sup> Provided for under Finance Act 2013, Schedule 43, paragraph 10



- 3.59. Other sanctions which may be considered are surcharges and the application of a measure similar to the Managing Serious Defaulters.

**Question 20.**

**In addition to those outlined above, what other safeguards do you think might be required in applying sanctions within special measures?**

- 3.60. AAT strongly considers the protection of a ruling from or appeal to an independent Tribunal or court should be obtained before sanctions are applied.

**Question 21.**

**Do you agree that two years is a suitable length of time to remain in special measures? If not, what duration would you suggest?**

- 3.61. AAT considers that two years compliant behaviour would be a suitable length of time to remain in special measures.

**Question 22.**

**Do you agree the criteria for determining exit from special measures are appropriate? If not, what criteria would you suggest?**

- 3.62. AAT agrees that the criteria for determining exit from special measures are appropriate which is the 'exit review' explained in 4.37 (conduc) to evaluate changed behaviour with regard to tax risk and transparency.
- 3.63. AAT also supports the proposal for HMRC to publicly announce the business as having left the regime.
- 3.64. Mindful that a business may not welcome further publicity the agreement should be sought and obtained before any public announcement by HMRC.

#### **4. Conclusion**

- 4.1. AAT regards as wholly inappropriate any delays in payment of tax through intentional, aggressive and artificial tax planning (3.27, above). AAT is therefore supportive of the above proposed measure to introduce:
- (i) A legislative requirement for large businesses to publish their tax strategy
  - (ii) A voluntary 'Code of Practice on Taxation for Large Business', which sets out the behaviours which HMRC would expect from its large business customers and
  - (iii) A narrowly targeted 'Special Measures' regime to tackle the small number of large businesses that continually undertake aggressive tax planning, or persistently refuse to engage with HMRC in an open and collaborative manner.
- 4.2. In paragraph 3.35 (above), AAT suggested that following advice from HMRC Appeals Handbook AH0605 with regards to Pepper v Hart (65TC421) may be of assistance in discerning the intention of Parliament behind legislation.
- 4.3. In paragraph 3.42 (above) AAT suggested that it may be helpful to ask the Tribunal to express an opinion on the artificiality of a failed scheme.
- 4.4. AAT set out in paragraph 3.48 (above) our view why surcharges may constitute a more effective deterrent to businesses whose main concern is achieving tax savings.

- 4.5. AAT does not agree to the removal of the defence of “reasonable care” on the grounds that this is a basic legal right and is concerned with ‘mission creep’ of this trend into general tax enquiries for the reasons explained in paragraphs 3.52 to 3.56 (above).
- 4.6. AAT strongly considered at paragraph 3.60 (above) that the protection of a ruling from or appeal to an independent Tribunal or court should be obtained before sanctions are applied

## **5. About AAT**

- 5.1. AAT is a professional accountancy body with over 49,500 full and fellow members<sup>6</sup> and 82,400 student and affiliate members worldwide. Of the full and fellow members, there are over 4,200 members in practice who provide accountancy and taxation services to individuals, not-for-profit organisations and the full range of business types.
- 5.2. AAT is a registered charity whose objectives are to advance public education and promote the study of the practice, theory and techniques of accountancy and the prevention of crime and promotion of the sound administration of the law.

## **6. Further information**

If you have any questions or would like to discuss any of the points in more detail then please contact AAT at:

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<sup>6</sup> Figures correct as at 30 Sept 2015