

Consultation Response

Advance Tax Certainty for Major Projects

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Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Tax law sub-committee welcomes the opportunity to consider and respond to HMRC's consultation *Advance tax certainty for major projects*.¹ The sub-committee has the following comments to put forward for consideration.

General Comments

Fees

We note HMRC's proposal to charge a fee for this service. This is an aspect that caused significant debate among our Tax Law Sub-Committee members. We consider that there are several issues that arise whether or not a fee is charged.

In the case of charging a fee, we highlight that a fee may be seen as acceptable as there are advantages of obtaining tax advance certainty from HMRC for interested parties, given the complexity of existing tax laws and the scale of investment within scope of these proposals. However, we would also highlight that the requirement of a fee risks penalising interested parties for trying to gain certainty regarding the amount of tax owed.

We note the resource requirement that would be required from HMRC to provide this service and understand that charging a fee could help provide the resource necessary for this service, but note that fees would likely need to be very high to make much of a contribution to this given the low numbers of projects expected to qualify. We would also note that all other clearance services offered by HMRC do not require a fee.

We would further highlight that given the demand for resources across various areas that HMRC faces, there is a need for a clear Service Level agreement from HMRC, if these proposals are brought forward.

We would also highlight that the involvement of public sector bodies further complicates the issue of charging a fee, given that these bodies often undertake

¹ [Advance tax certainty for major projects consultation - GOV.UK](https://www.gov.uk/consult/advance-tax-certainty-for-major-projects)

PFI or PPP projects which are of significant size and have very complex tax structuring and it may be seen as counterintuitive that a public body pay a fee to HMRC.

We would highlight the risk of negative public perception issues for HMRC, regardless of whether it charges a fee or not: if a fee is charged it some may perceive this as wealthier taxpayers or larger businesses being able to pay to get a better service; if a fee is not charged it may be seen as unreasonable that all taxpayers should bear the cost of providing a better service to wealthier taxpayers or the largest businesses.

Chapter 2: Eligibility

1) What is the impact of giving eligibility to corporate entities that are or will be subject to CT and are directly undertaking major investment projects? Does this exclude any other structures investing in major projects which would significantly benefit from being in scope?

We highlight the need for clarity in respect of which entities this will apply to, in order to ensure that no entities subject to CT but not directly undertaking major investment projects are caught in scope.

We would suggest that consideration should be given to structuring eligibility around the undertaking of major investment projects, with early engagement with HMRC informing whether the project falls into scope and allowing for flexibility, rather than relying on CT to determine eligibility.

Whilst we understand the rationale for linking eligibility to CT as the usual or major likely tax nexus, we would suggest that consideration should be given to widening the scope of the eligibility to include other significant tax nexuses.

We would further highlight that major investors such as pension funds, partnerships and sovereign wealth funds should not be prevented from obtaining advance certainty on major investment projects.

We also seek further clarity on whether this is intended to be a pre-project or post-project action, as the consultation makes reference to HMRC anticipating applications in advance of finalisation of accounts for a period to support appropriate tax reporting and applications in advance of submission of the CT return to support correct filing.²

² [Advance tax certainty for major projects consultation - GOV.UK](https://www.gov.uk/consult/advance-tax-certainty-for-major-projects)

2) How can advance tax certainty provide material wider benefit beyond the entity receiving the clearance?

We refer to our answer for Q.15.

3) What is the best way of quantifying the fixed and intangible investment for the purposes of assessing whether a project meets the threshold? Do you agree that authorised project spend is a suitable metric?

We would caution against implementing an arbitrary threshold as this can embed inflexibility.

We would suggest consideration should be given to whether a monetary threshold is appropriate. We would highlight the situation where a project initially does not meet the threshold- and therefore does not qualify for the mechanism providing advance tax certainty- but over the course of the project exceeds the monetary threshold as an example of the technical difficulties of applying a monetary threshold in cases such as this.

4) Is there a set amount of expenditure that would prompt you to seek a clearance or certainty, or would this be more attributable to the amount of tax and uncertainty in treatment?

We have no comments.

5) Are there supplementary criteria, which are objective and measurable, which could capture projects below the quantitative threshold which are nevertheless of a national or strategic importance, are highly impactful on a relative basis within their sector, or that have large growth potential despite starting small?

We appreciate the difficulties in quantifying the importance of lower-cost projects which are significant to their relevant sector or geographic area or those which have large growth potential.

We would, however, suggest that consideration should be given to examining supplementary criteria based on the below-mentioned factors. We would suggest that HMRC be required to consider an application for advance certainty on the basis a project containing at least one of the below criteria:

- National or Strategic importance.
- Large growth potential.
- Significant part of a business's income stream.
- Regionally significant.

Chapter 3: Scope

- 6) In which areas of UK tax legislation would advance tax certainty have the most impact on investment decisions? Where possible please give examples of where lack of certainty has had a negative effect on an investment decision.

We would seek clarity on how HMRC envisages this mechanism interacts with the General Anti-Abuse Rule (GAAR). i.e. would the clearance cover this too (as not being applicable)?

We would highlight that current UK tax laws are very complex (often because of a need to react with anti-avoidance legislation where loopholes were being relied upon), and the interaction of the different tax regimes can be difficult to navigate in complex transactions. There is therefore often a lack of clarity, and so in principle, we welcome this proposal. The nature of a complex project is that it will often touch on the full range of taxes (in particular, corporation tax, VAT, stamp taxes and employment taxes). To be of optimal value we consider this service should cover all relevant taxes, GAAR and any reporting obligations.

- 7) Are there areas for which certainty would be of value that are not currently addressed by the non-statutory clearance process? What do you see as potential benefits and barriers to their inclusion?

We have no comments.

- 8) Who do you consider should be bound by an advance certainty clearance and to what extent. What form should that take?

We consider it appropriate that HMRC should be bound by an advance certainty clearance as this will provide confidence for taxpayers in this mechanism. We consider the existing provisions for withdrawals an adequate safeguard to allow HMRC to correct any mistakes, as this also provides a timeframe for adjustment on behalf of the taxpayer.

We do not consider it appropriate that the taxpayer is bound by an advance certainty clearance, as they will require flexibility to manage their tax affairs and potentially choose other investment avenues or mechanisms, even following the receipt of advance certainty clearance.

9) What are the circumstances under which you consider it important to be able to continue to rely on a clearance?

See our answer to question 8. We would highlight the vast financial scale of these projects. Given the scale, we believe that it is a matter of both legal and economic import that interested parties are able to rely on a clearance.

Chapter 4: Process

10) Do you consider that an early engagement facility would be helpful and why?

We refer to our answer to question 1. We would also suggest that the proposed timing of the triaging process in box 4.A should take place during the early engagement phase.

11) How would this process work with typical commercial decision-making timescales?

We would highlight the need for a proper resourcing of the team at HMRC responsible for clearances. Please see our answer to question 13 for further details.

12) What facility would be helpful for unsuccessful clearance applications? Do you consider for example that the process should include reconsideration by HMRC on request?

We would suggest that consideration should be given to inclusion of a process to allow for reconsideration by HMRC on request. Please see our answer to question 14 for further details.

13) Do you consider a scoping meeting to obtain clarity on scope of clearance, timing and inputs to be useful? What would a scoping conversation need to include?

We consider that this would be a useful tool for obtaining clarity, for both HMRC and the interested party.

We would reiterate the need for proper resourcing of the responsible team at HMRC, both in order to work alongside commercial decision making timescales and to avoid long periods of uncertainty.

14) Are there process elements you would consider helpful during the clearance consideration phase?

We would consider it helpful if as part of the scoping process, or in the event of any lack of clarity during the clearance consideration phase, the interested party could meet with HMRC to discuss the application for clearance.

In general, we would highlight that HMRC may need to accommodate for a fluid communication process during the consideration phase and flexibility around any changes that impact the clearance once given.

We would also highlight the need for a specific HMRC contact and email address to be given for contact once clearance is in process, in place of a generic mailbox.

15) What do you consider the advantages and disadvantages of publishing summarised and anonymised clearances to be? Has publication by other clearance jurisdictions aided tax certainty as a result?

On balance we consider it advantageous that clearances are published as summaries and anonymised to hopefully provide more clarity for other taxpayers in future, although we would note that this conclusion does not sit well if the taxpayer has had to pay a fee for this service (see comments on charging for this service under our General Comments). We are concerned though that publishing a summary could be a disincentive to use this process if, even anonymised, the description of the project would lead to it being easily identified.

We suggest the New Zealand rulings system should be considered for useful information if it has not already been e.g. types of rulings available (and which are published), process and fees charged.

16) What would you wish to see in terms of engagement for clearances where impacted post issuance by legislation, ownership, case law or key facts and assumption changes?

We refer to our answer to questions 3, 14 and 17.

Furthermore, we consider it important HMRC is bound by clearances and that any change in law that would impact on the clearance implemented having regard to their legitimate expectation created by the clearance of a certain treatment e.g. perhaps an adjustment period. We would appreciate further clarity from HMRC regarding their proposal on how this would be dealt with, bearing in mind the interaction of legitimate expectation and the obligation to follow the law (as changed).

We suggest that it may be appropriate for the clearances to remain in force until there is a change in law that necessitates a different result.

17) What should a renewals process look like, and is 5 years an acceptable trigger point?

We do not consider 5 years to be an acceptable trigger point, given that certain projects could span over a significant number of years and this would represent an administrative burden to them.

Given the anticipated small number of projects which apply for this tax mechanism, we would suggest it may be appropriate that the decision remains binding until there is a change in law that necessitates the clearance changing, not a blanket 5-year period as a trigger point for requiring a renewal application.



For further information, please contact:

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