



NOTIFICATION OF UNCERTAIN TAX TREATMENTS

Issued 14 September 2021

ICAEW welcomes the opportunity to comment on HMRC's draft legislation and guidance on the Notification of Uncertain Tax Treatment (NUTT) rules published on 20 July and 19 August 2021 respectively, a copy of which is available from this [link](#).

This response of 14 September 2021 has been prepared by the ICAEW Tax Faculty. Internationally recognised as a source of expertise, the faculty is a leading authority on taxation and is the voice of tax for ICAEW. It is responsible for making all submissions to the tax authorities on behalf of ICAEW, drawing upon the knowledge and experience of ICAEW's membership. The Tax Faculty's work is directly supported by over 130 active members, many of them well-known names in the tax world, who work across the complete spectrum of tax, both in practice and in business. ICAEW Tax Faculty's Ten Tenets for a Better Tax System, by which we benchmark the tax system and changes to it, are summarised in Appendix 1.

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KEY POINTS

1. We very much welcome the fact that HMRC has revisited these proposals in the light of the responses received to the second consultation document and made a number of changes, especially the reduction in the number of criteria that would cause an amount to be considered as “uncertain”. However, we are still concerned that there remains a high level of uncertainty over the correct application of the remaining criteria. In particular, we are concerned that:
 - the accounting provision criterion at paragraph 9 (2) will apply in a greater number of instances than HMRC envisages (especially as the carve-out for transfer pricing cases does not apply to this criterion).
 - It will be difficult to ascertain HMRC’s position in many instances, making paragraph 9 (3) difficult to apply in practice. This is especially because the guidance comes to some surprising (in our view) conclusions about what documents and items of guidance can be taken as indicating HMRC’s view on a matter. It also suggests that businesses should take into account the fact that HMRC has an appeal pending against a court decision, even though it is often difficult to determine whether such an appeal has been made.
 - There is insufficient guidance to help businesses ascertain how a court might opine on a particular case under the “substantial possibilities” criterion at paragraph 9 (4).
2. We would appreciate further guidance on a number of aspects of the regime including:
 - Whether a notification counts towards protecting the business against HMRC later trying to issue a discovery assessment if it transpires that too little tax was paid in relation to the uncertain tax treatment (this should ideally be set out in law)
 - How to deal with situations where there are multiple alternative treatments compared to the one adopted in the business’ tax returns (the legislation and guidance only seem to account for cases where there is only one alternative outcome).
3. We believe that example five at UTT15200 re notification deadlines is incorrect and needs to be updated to reflect the position under para 14 (1) (b) Schedule 18 FA 1998.
4. The section of the draft guidance on reasonable excuse is broadly consistent with the current draft re-write of the general reasonable excuse guidance that came about as a result of the ‘deep dive’ as part of the post 2012 powers review. However, we believe that this section is truncated in some crucial places and it would therefore be better to provide signposts and links to the more detailed guidance.
5. We would also like to know how much resource will be given by HMRC to its notification mailbox and whether taxpayers will receive a “notification reference” similar to the disclosure reference given via the Digital Disclosure System.
6. Overall, we believe that the legislation and supporting guidance do not provide sufficient clarity and introduce significant additional complexity for affected businesses in fulfilling their tax administration obligations. As such, the draft provisions do not comply with Tenets 2 and 3 of our *Ten Tenets for a Better Tax System* summarised in Appendix 1 in our opinion.

DETAILED FEEDBACK ON THE DRAFT LEGISLATION

Para 7 - “Turnover” and “balance sheet total”

7. This paragraph defines the terms “turnover” and “balance sheet total” for the purposes of determining whether a company, partnership or group is sufficiently large to fall within the regime. Sub-paragraphs 7(2) (b) & (d) and (4) (b) & (d) refer to attributing UK activities to non-UK resident entities on a just and reasonable basis.
8. While we appreciate this is an easy and convenient way of framing the law, it may lead to a number of disputes around how much should justly and reasonably be allocated to UK

activities. The draft guidance merely recites the legislation and doesn't provide any assistance as to how to determine what is just and reasonable.

9. We request that HMRC either provides more guidance on how to calculate this (perhaps considering any branch accounts filed with Companies House) or takes a light touch with regard to penalties if an entity is around the size to just about fall within this regime but there is some uncertainty as to the amount of turnover or balance sheet to be attributable to its UK presence.

Para 9 – Uncertain tax treatment

10. Sub-paragraph (2) refers to “provision” having “been recognised in the accounts of the company or partnership, in accordance with generally accepted accounting practice, to reflect the probability that a different tax treatment will be applied to the transaction to which the amount relates.”
11. We assume this means that this criterion applies if a provision has been made in the accounts of the entity concerned and therefore considerations of probability etc are accounting considerations.
12. We believe it would be clearer if the above sentence ended as follows: “to reflect that a different tax treatment may be applied to the transaction to which the amount relates.”

Paras 11 & 12 - “Tax Advantage”

13. These two paragraphs include timing differences within the definition of a “tax advantage”. This is defined for the purposes of determining whether an uncertain tax treatment meets the threshold test at paragraph 10. The threshold test essentially considers whether the value of the tax advantage obtained from bringing the amount into account in this way compared to the alternative treatment (the “expected amount”) as indicated under subparagraphs 9 (2) - (4) is more than £5m.
14. Sub-paragraph (11) (e) refers to “deferral of a payment of tax or advancement of a repayment of tax” in respect of corporation tax and income tax. Subparagraph 12 (c) refers to an increase in the period between the recovery of input tax and the payment of output tax.
15. While definitions of “tax advantage” within the tax legislation often refer to deferral of tax payments, we believe that it should be excluded from this particular definition.
16. Presumably, if the tax advantage arising is one only of deferral rather than reduction of tax, then the threshold test will never be met because the amount brought into account and the expected amount will always be the same. Or is the requirement for entities to take into account the time value of money and quantify the benefit to the entity of paying a tax later?
17. Overall, this is very unclear and we therefore recommend that only absolute tax differences, rather than timing differences, are taken into account when determining whether the threshold has been met and what needs to be notified.

Para 19 – Transfer Pricing exemption

18. We are disappointed that the exemption for uncertainties arising from transfer pricing transactions only applies where the substantial possibility criterion is met. The provision criterion in particular is likely to be met more often than businesses and HMRC would like, especially where a company is applying IFRIC23.
19. We understand that businesses will typically provide for the additional tax that might arise on the basis of alternative pricing on intra-group transactions as a matter of course where the pricing is not entirely certain.
20. It is likely that HMRC will be inundated with notifications that it may not have the resource to review or deal with unless the exemption also applies to transactions meeting this criterion.

General

21. We have noted that there is no mention of whether a company's notification will count towards protecting it against HMRC later trying to issue a discovery assessment if it transpires that too little tax was paid in relation to the uncertain tax treatment (and HMRC didn't open an enquiry).
22. Our view is that as the company has given HMRC the information this should protect it from discovery. Indeed, HMRC has indicated that it broadly agrees – see paragraphs 3.93 and 3.94 of the responses to the first consultation. However, this point is not directly addressed in the draft legislation.
23. Both income tax & corporation tax are subject to discovery assessment legislation that broadly says HMRC can assess additional tax (within its assessment time limits) if either:
 1. an under-assessment arises which is caused by careless or deliberate behaviour of the company or someone acting on its behalf; or
 2. at the point HMRC ceased to be able to open a self-assessment enquiry, HMRC could not reasonably be expected to be aware of the under-assessment based on the 'information made available' (as defined in the legislation).
24. But the above do not apply if the return was prepared in accordance with generally accepted practice.
25. The issue is that the existing discovery assessment legislation contains a list of the documents that are relevant when the 'information made available' test at point 2 above is considered. If something is not on the list, then case law to date generally shows that its existence is ignored when deciding if HMRC could issue a valid discovery assessment.
26. The draft NUTT legislation does not say that the NUTT will be within the relevant return eg the corporation tax return or partnership return that the UTT relates to. This leaves open the possibility that the NUTT will be a separate document entirely and does not have to be submitted with the return itself.
27. It therefore seems that s29(6)(a) - (c) TMA 1970 will not cover the NUTT and, whilst s29(6)(d) might cover it, we think it would be better to put the point beyond doubt so that it does not need to be considered by a Tribunal/court in due course.
28. We therefore suggest that a new clause is inserted into the draft schedule to update s29(6) to add a new provision to the effect "it is contained in the taxpayer's notification of uncertain tax treatment under para 8 (of the NUTT schedule) or in the information provided to HMRC which is referred to at Para 16(1)". The latter part after the 'or' is intended to cover any informal notifications to HMRC that then means that the formal NUTT is not required.
29. This suggested amendment to s29 should cover partnership returns by virtue of s30B(7) TMA 1970. A similar new clause will be needed for the corporation tax equivalent of s29(6) ie para 44(2) Sch 18 FA 1998.
30. A similar amendment may be also be needed for VAT purposes.
31. On PAYE, HMRC generally assesses extra PAYE using Reg 80 determinations under SI 2003/2682. Reg 80(5) says that a determination is subject to parts 4, 5 (other than section 55) and 6 of TMA (assessment, appeals, collection and recovery) as if the determination was an assessment. Whilst s29 TMA is in part 4 of TMA, the Upper Tribunal in *Weight Watchers (UK) Ltd v HMRC* [2012] said that the criteria in s29 do not apply to Reg 80 determinations. There is no equivalent of s29(6) in Reg 80 at present so, as our suggested addition set out above re s29(6) and Para 44(2) appears not to be relevant for PAYE, further amendments may therefore be required to achieve the same effect.

DETAILED FEEDBACK ON THE DRAFT GUIDANCE

UTT13000 - Notification Criteria

UTT13100 Tax Provisions

32. While the accounting provision criterion is fairly straightforward and explained well in the guidance, we believe that the inclusion of examples might help to illustrate the position more clearly.
33. The guidance at UTT13100 refers to the making of an accounting provision that reflects “the probability that a different tax treatment may be applied to the transaction”. This is the same as the phrase used in the legislation at clause 9 (2), except that this refers to “a different tax treatment will be applied” (our emphasis). The nature of a provision is to account for the possibility of an alternative outcome, rather than the certainty of it. Therefore, “may” is a better word to use here than “will”. As we have explained in our comments on the draft legislation, we recommend that the words “the probability” are removed from the legislation so that it is clearer that the only test to consider here is whether a provision has been included in the accounts.
34. It appears from the guidance that a notification is required if there is a provision in the accounts, and UTT14300 goes on to explain that the expected amount to be disclosed is the amount of the provision made in the accounts. This amount may be a little meaningless in some cases as, for example, IFRIC23 sets out what amounts are to be recognised for both deferred and current income tax assets and liabilities. Should businesses be disclosing deferred tax provisions as well as current tax?
35. These provisions are calculated based on a weighted average of potential outcomes. So, for example, if there are five potential outcomes, then a business is required to estimate the likelihood of each of these occurring and arriving at an average amount taking each of these into account. It is not clear to us what value this aggregate figure would give to HMRC other than to alert it to the fact that the business has identified that there is uncertainty. If the business would be expected to provide more detailed information setting out the various alternative positions, it would be useful to set this out in the guidance.

UTT13200 HMRC’s known position

36. Whilst we believe that this section provides very useful guidance in helping to determine what is HMRC’s known position, it still leaves a lot of questions unanswered. Considerably more clarity and use of examples is required so that the guidance can be used to support businesses in assessing this criterion.
37. We find some of the classifications of items in the table in this section to be rather surprising and would appreciate clarification on why HMRC does not consider the items in the right hand column to represent HMRC’s known position. This would be useful as the guidance states that the list in the table is not exhaustive and so it is important to understand what are the nature of the differences that HMRC sees between the items in the two columns so that they can be used to assess other forms of guidance and publications.
38. It is particularly surprising that explanatory and technical notes are not to be considered to represent HMRC’s view (provided they have actually been written by HMRC rather than HM Treasury or another government department). It is possible, of course, that HMRC’s view on a piece of legislation might change some time after it has been introduced but in the absence of written guidance on that change in view, we do not see why the initial explanatory notes could not be taken as representing HMRC’s view.
39. We suggest it is made clear that positions set out informally by HMRC at stakeholder meetings (such as those attended by ICAEW and other representative bodies) should not included within the sources of HMRC’s known position as these are often not in the public domain or, if so, are not highly publicised.
40. The section headed “Outdated or contradictory HMRC publications” acknowledges that HMRC’s guidance may be out of date as a result of a Tribunal/Court judgement running contrary to HMRC’s stated position. However, it also says “Notification is still required where there is legal uncertainty that HMRC’s view is correct, for example, where the Upper Tribunal has found HMRC’s view to be incorrect, but that judgement is being appealed.”

41. It can sometimes be hard for third parties (ie companies who are not party to the appeal, and their agents) to know with reasonable certainty if an Upper Tribunal decision is being appealed. If there is a publicly available list that shows which Upper Tribunal decisions have been appealed but are waiting for a hearing to decide if the UT is going to give permission for the onward appeal to proceed, it would be useful if a link to this could be provided in the guidance.
42. There is a list of cases where the UTT has refused permission to appeal but the Court of Appeal is yet to have the permission hearing to decide if the appeal will be permitted. Similarly the list of cases in the Court of Appeal process up to a decision being made is available. However, we are not aware of a list of cases where there is a party seeking permission from the Court of Appeal or Supreme Court to appeal the Court of Appeal decision. The Supreme Court publishes a list of cases after the permission hearing occurs but this is not until several months later and it is not searchable (see here). There is no list of cases awaiting a hearing until shortly before the hearing is scheduled. Also, the lists themselves are updated periodically, not 'real-time'.
43. Given these gaps, it seems unrealistic for companies to know in all cases whether a case is under appeal from HMRC. We recommend that the guidance is updated to say that companies should proceed on the basis that there is no appeal unless (a) HMRC publicly states that it is appealing or (b) an appeal is publicly listed as unresolved and provides links to where the appeal lists can be found. Alternatively, we consider that a company would have a reasonable excuse for not notifying a position that appears not to be uncertain as result of a court decision and it is not clear from information easily available that HMRC is appealing it. We would appreciate HMRC's view on this.
44. The guidance makes the point that more recently published guidance should take precedence over older guidance. However, it is not always easy to determine which of two pieces of guidance is the more up to date. Does HMRC agree that a company would have a reasonable excuse for failure to notify if it has taken all reasonable steps to ascertain HMRC's current position on a particular scenario?

UTT13300 Substantial Possibility

45. This criterion is inherently subjective and difficult to apply in practice because it is reliant on assessing the reasonableness of a third party making a hypothetical judgement. Guidance on how to assess whether this criterion is met is therefore essential, otherwise we believe that it is not workable.
46. We think that the draft guidance on this criterion is not especially helpful as it is explained with reference to factors external to a Court (for example, the fact that different advisors have recommended different tax treatments, or the outcome of the business' own risk management processes, neither of which have anything to do with a court's decision making process).
47. The guidance also says that "whether HMRC challenge the tax treatment is not the test for this criterion" but then goes on to say "a factor that suggests there is not a 'substantial possibility' that an alternative treatment would be found to be correct by a tribunal or court, is a written indication from HMRC that there is no material uncertainty about the tax treatment."
48. This seems to us to be rather contradictory. Presumably the rationale here is that if HMRC has indicated that it does not see a material uncertainty then it will not challenge the position at the tax tribunal. However, that outcome cannot be guaranteed as HMRC may change its mind in the light of new information about the transaction, for example. Also, this test relates to a hypothetical decision by a hypothetical court and is predicated on the assumption that the case has already gone to court, not whether HMRC is likely to take it to court.
49. It would be more helpful to provide examples of previous cases where HMRC believes that this criterion would or would not have been met, perhaps contrasting a case where HMRC's case arguably had little chance of success with one where the position was more finely balanced. This would help to illustrate what is meant by a "substantial possibility", which is never defined in the legislation.

UTT14000+ Threshold test

UTT14200 Tax advantage

50. In the examples included in this section, it would be useful if HMRC sets out which of the notification criteria it believes have been met in each case.
51. It would also be helpful if HMRC confirmed whether the bullet point list of circumstances it gives here where a qualifying company or partnership obtains a tax advantage is just a list of examples or is an exhaustive list.

UTT14300 The expected amount

52. The guidance recognises the possibility that more than one notification criterion is met and confirms that, in that case, the larger tax advantage is taken as the expected amount. However, it doesn't set out what happens if there are multiple potential outcomes under the same notification criterion. Presumably the company must apply the outcome which results in the highest tax advantage? What happens if it is not possible to estimate the size of the tax advantage? Should the company then take a best estimate? Also, what happens if the technical basis for analysis is agreed between HMRC and the taxpayer but they vary in how they think the fact pattern fits within that analysis? How would this be quantified?

UTT14500 Related amounts

53. One of the criteria for determining if amounts are related is whether the tax treatment applied in arriving at one amount is substantially the same as the tax treatment applied in arriving at the other amounts. Some useful examples are given in relation to VAT and PAYE-related amounts but it would also be useful to have an income tax or corporation tax example to illustrate a situation where two amounts subject to these taxes have had the same tax treatment applied to them.
54. In addition, the VAT example, (different flavours of the same energy bar) is very straightforward and it would be useful if a less obvious example was also given to illustrate the extent to which two different tax treatments would be considered "substantially the same". For example, would the tax treatments adopted by a residential property developer disposing of units in different developments during the same financial year be considered substantially the same? It is important to understand to what extent tax treatments need to be similar or different to fall inside or outside this test as it would appear that this does not need to relate to the similarity or otherwise of the products or transactions involved but rather the similarity of tax treatment.
55. In an example involving a trust and PAYE & CT related amounts, the guidance makes it clear that separate notifications are required for corporation tax and income tax as they are separate taxes. However, it is not entirely clear whether the income tax and corporation tax amounts need to be aggregated in determining whether the threshold test has been met. It would be useful if this was confirmed in the guidance.

UTT15000 Notification Process

UTT15100 Notification requirement and form

56. It is not clear from the guidance whether the notification form needs to be completed by the company itself or whether it is possible for an adviser or agent to do this on the company's behalf. If the former, would it be possible to include a proforma in the guidance so that agents can draft the wording for the submission for the company to submit? Companies will probably want to take advice on what information to include in the notification so guidance on a suitable wording would be very helpful.
57. The guidance does not specify or set out whether notifications can be made by a nominated group company on behalf of multiple companies in a group. This would be particularly useful if, for example, a number of different companies in the group are subject to the same transaction or apply the same tax treatment to multiple transactions. We assume that it would

be in HMRC's interests if such transactions were only notified once as it would have fewer notifications to process overall and would still receive the same information than if all the companies involved each submitted notifications separately.

58. We assume that details of the online form to be used are not yet available because the design has not been completed but we request that more detailed instructions about how to complete the form and who can do so will be provided in due course. We would be happy to review the form in advance and to obtain feedback from members regarding its usability.

UTT15200 Notification deadlines

59. We have reached a different conclusion to that in example 5 in this section (company with a financial year longer than 12 months).
60. The deadlines for notifying HMRC of an uncertain tax treatment are as follows:
- a) Where the relevant return is an annual return, the notification must be given on or before the date on which the return is required to be made.
 - b) Where the relevant return is not an annual return, the notification must be given on or before the date on which the last relevant return for the financial year in question is required to be made.
61. Where a company files a set of company accounts for a period that is longer than 12 months, it is necessary to file two corporation tax returns (one for the first 12 months and then another for the remainder of the period of account). In that case, it is necessary to consider whether the corporation tax returns are annual returns. The term "annual return" is not defined in the draft legislation but we assume that it relates to a return that is typically filed annually. In this case, even though one of the corporation tax returns is being prepared for a period that is less than 12 months, we assume that this still constitutes an annual return. Hence, the notification relating to the two returns must be made on or before the date on which the returns are required to be made.
62. Under para 14 (1) (b) Schedule 18 FA 1998, the filing date for a company tax return is 12 months from the end of the company's period of account if that is not longer than 18 months. Hence, in example 5, the corporation tax returns concerned would both be due by 31 December 2022. This means that the notifications of uncertain tax treatments relating to both returns would also be due by that date. We request HMRC's confirmation of this.
63. The guidance also does not provide examples which deal with the situations covered by para 14 (1) (c) (relevant period of account longer than 18 months) or (d) (return filed following notice served) or para 19 (return filed later as a result of later filing of company accounts). It would be useful for the guidance to set how these situations affect the deadline for notifications.

UTT15310 General Exemption

64. There is further information about the general exemption at UTT18200. There doesn't seem to be much logic in having information about this exemption in two different places and we recommend that these two sections are merged.
65. The guidance states that the general exemption (prior notification to HMRC) does not apply where the information has already been provided by another company or partnership in the same group (or in a return or during the course of an enquiry into the return of that company or partnership), We suggest that this should not be the case if the disclosing company or partnership makes it clear that the disclosure is being made on behalf of the other entity. This would then allow group notifications as we suggest in our comments on UTT15100.

UTT18000 Exemptions

UTT18200 General

66. We are very surprised by HMRC's conclusion that whether or not an uncertainty highlighted in a non-statutory clearance application constitutes prior notification of that uncertainty is

dependent on the outcome of the application. Surely the same information is provided regardless of HMRC's view of the tax treatment outlined in the application and we invite HMRC to reconsider this conclusion or provide further details as to its reasoning.

67. We assume that if HMRC refuses to grant a clearance and cites the reason that there is no uncertainty in the tax treatment (which is quite a regular occurrence, in our experience) then the company can be comfortable that none of the notification criteria are met on the basis that there is no uncertainty. We would appreciate HMRC's views on this being included in the guidance.
68. There are no details provided in the guidance about what support will be provided to businesses that do not have a customer compliance manager (CCM) to disclose and discuss uncertainties with HMRC in advance of a written notification being required. We believe it is important that all businesses are treated the same and given the same experience and support in complying with this new regime. We request further details to be provided as they become available.

UTT19000 Assessing a penalty

UTT19120 In what circumstances is a penalty chargeable: types of penalty

69. The guidance says that "a company or partnership is liable to a penalty if it is required to notify HMRC of a UTT and fails to do so. Where there are multiple failures in respect of a notification requirement for a relevant tax only one penalty is chargeable."
70. Although it is not clear, we assume that where a company makes more than one of the types of failure set out in the bullet points at UTT19110 in respect of the same tax and financial year, only one penalty is payable. This could happen where, for example, a company submits a notification late and then HMRC later discovers that an uncertainty was missing from this notification. We would appreciate HMRC's confirmation of this.

UTT19130 In what circumstances is a penalty chargeable

71. In example one, should this say that HMRC is not aware of the failure until 15 January 2023? Why does it not become aware of it until 30 January?

UTT19200 Reasonable excuse

72. We believe that this section is broadly in line with the current draft re-write of the general reasonable excuse guidance that came about as a result of the 'deep dive' into reasonable excuse as part of the post 2012 powers review.
73. However, we are unsure why there is a need for a reasonable excuse section in this guidance at all and think that a signpost to existing guidance may be more appropriate. One of the main reasons for this is that this section is truncated in places compared to the general guidance and so some key points are missed out, which a reader would not appreciate unless they read or were already familiar with the general guidance. Some examples of this are as follows:
 - The draft general reasonable excuse guidance has an entire section on ignorance of the law whereas UTT19240 merely says that this is not normally a reasonable excuse.
 - There is no mention of the *Perrin* case, which we understand is the most important of the recent reasonable excuse cases heard at the UTT.
74. The draft at UTT19250 – Insufficiency of funds appears to be out of date. The fourth paragraph in this section makes reference to 'unforeseeable' and suggests that insufficiency of funds must be unforeseen/unforeseeable in order to constitute a reasonable excuse.
75. We recommend that this section is updated to reflect **ETB (2014) Ltd v HMRC [2016] UKUT 424 (TCC)** which confirms that the test is not whether the event is unexpected, unusual, unforeseeable or beyond the taxpayer's control. Instead, the question is whether the insufficiency of funds was reasonably avoidable eg by the exercise of reasonable foresight and due diligence. In any event, it seems unlikely that a business would cite insufficiency of

funds as a reason for not having submitted a notification and so there is a question over whether this section is really needed, other than because insufficiency of funds is mentioned in the draft legislation at para 22 (2) (a).

76. The guidance also appears a little contradictory around what happens if a key person is ill or otherwise unable to submit the notification on time. UTT19220 seems to assume that the corporate will always have other people who can step into their shoes and get the notification done, but this may not be the case depending on the size/experience etc of their in-house team. A large partnership will need their representative member to submit the notification – again it may not be so easy to change that person at short notice.
77. However, UTT19270 gives an example of someone being ill and this being a reasonable excuse. The latter seems the better way to think of it. However, the example given assumes that the person is able to submit the notification within two weeks of returning to work. This is perhaps too short a period to be realistic, depending on how much work remained to be done on the notification when they went off sick. Perhaps it would be better to say a month rather than two weeks?
78. The emphasis in this section is mainly on what constitutes a reasonable excuse for failing to submit a notification form. There is not much detail on how to determine what is a reasonable excuse for not including an uncertainty within a submitted notification form. For example, UTT19260 talks about reliance on another person to do something on your behalf but does not talk about reliance on advice given by that other person as a competent professional. Would a company have a reasonable excuse if it took advice from an accounting firm that said the firm did not believe that there was an uncertainty? We consider that it is at least just as likely that a company would take a view contrary to HMRC that a position is uncertain than it is to fail to submit a notification form for a particular tax and year and so it is important to cover this area also.

UTT19300 Assessing a penalty

79. In UTT19310, it says that the notice of the penalty is sent to the company but we request that this sent to company's agent as well.
80. In UTT19320, the words "later than" are added to the wording at para 23 (2) of the draft legislation. Presumably it is more accurate to say "after the earlier of the following". Otherwise, if the notification was filed by the company only, say, two weeks late, HMRC would still have nearly five years in which to raise the penalty. This seems unreasonable and would not provide much certainty for the business concerned in the meantime.
81. We cannot see how the examples given in this section illustrate the latest date by which a penalty may be generated. We request that the examples are updated to reflect this because as it stands the legislation and the guidance are not sufficiently clear on this point.
82. UTT19330 says "a penalty payable by a company is enforceable as if it were corporation tax charged in an assessment. A penalty payable by a partnership is enforceable as if it were income tax charged in an assessment." This is what we were expecting to see in the legislation but the wording at para 25 is a little different. See [Para 16\(3\)\(b\) Sch 41 FA 2008](#) for an example of how we would expect the law to look instead.

UTT19400 General Exemption

83. As per our earlier comments, this should be merged with the commentary at UTT15310 so that all of the guidance on the general exemption is in one place.

UTT19500 UTT Appeals

84. We note that the draft legislation (Para 24(6)) cross references to Part 5 of TMA, however this part of the guidance only mentions appeal to the Tribunal. Part 5 of TMA permits appeals by requesting HMRC reviews its decision. Will corporates be barred from requesting statutory review (in which case the cross reference to Part 5 of TMA may need to be amended) or does the guidance need to be amended? Statutory reviews are an effective

way of resolving reasonable excuse based appeals as is shown by the data HMRC released last month.

APPENDIX 1

ICAEW TAX FACULTY'S TEN TENETS FOR A BETTER TAX SYSTEM

The tax system should be:

1. Statutory: tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.
2. Certain: in virtually all circumstances the application of the tax rules should be certain. It should not normally be necessary for anyone to resort to the courts in order to resolve how the rules operate in relation to his or her tax affairs.
3. Simple: the tax rules should aim to be simple, understandable and clear in their objectives.
4. Easy to collect and to calculate: a person's tax liability should be easy to calculate and straightforward and cheap to collect.
5. Properly targeted: when anti-avoidance legislation is passed, due regard should be had to maintaining the simplicity and certainty of the tax system by targeting it to close specific loopholes.
6. Constant: Changes to the underlying rules should be kept to a minimum. There should be a justifiable economic and/or social basis for any change to the tax rules and this justification should be made public and the underlying policy made clear.
7. Subject to proper consultation: other than in exceptional circumstances, the Government should allow adequate time for both the drafting of tax legislation and full consultation on it.
8. Regularly reviewed: the tax rules should be subject to a regular public review to determine their continuing relevance and whether their original justification has been realised. If a tax rule is no longer relevant, then it should be repealed.
9. Fair and reasonable: the revenue authorities have a duty to exercise their powers reasonably. There should be a right of appeal to an independent tribunal against all their decisions.
10. Competitive: tax rules and rates should be framed so as to encourage investment, capital and trade in and with the UK.

These are explained in more detail in our discussion document published in October 1999 as TAXGUIDE 4/99 (see <https://goo.gl/x6UjJ5>).