Comment

Views on topical issues

Combating consultation fatigue

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Do we need a consultation on the consultation process?
As we approach the autumnal equinox and leave summer behind, we can at last breathe a sigh of relief. While there are a few exceptions, the vast majority of the consultations that were launched in the aftermath of the Budget have now been addressed and have closed for responses. The profession can look forward to a few weeks of peace before the Autumn Statement and the publication of the draft Finance Bill.

The consultation process in most cases is extremely valuable, taking tax policy forward in a cooperative and sensible way, building consensus with the tax-paying community and ultimately resulting in far better tax legislation and administration. However, notwithstanding this, faced with ever more consultations, there is a real risk of consultation fatigue and a decline in responses. Engagement remains critical if government is to really understand the impact of the policies that it is proposing and we are to move forward to an improved tax regime. Given this, it is essential that the Treasury and HMRC look again at the point at which they go to, and what they put to, consultation.

A consultation should represent a real engagement between the government and the taxpayer, whether more in the form of a Green Paper, asking for ideas, or a White Paper, outlining a proposal. In responding to a consultation, the taxpayer is investing time, both in understanding the approach of the government and in considering its own view. It therefore expects that consultation will only be used once the policy questions are suitably defined.

Much of the discussion of 'consultation fatigue' arises from the belief that consultations are being used to make up for partly complete policy development, relying on the taxpayer to address weaknesses in the thinking. This risks undermining the commitment of the tax community to engaging in such discussions, to the detriment of all parties.

So, as we draw breath and watch the diminishing number of open consultations, we should make sure we come back refreshed and ready for the Chancellor's early Christmas present of the next batch of consultation papers. But the government needs to also fulfil its side of the bargain and ensure that it has really considered the questions it wants to ask and how the answers can be used to build a better tax system. Perhaps it should consult on this?

HMRC and the GAAR advisory panel

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Why HMRC should have a place on the advisory panel.
The government proposes that alongside the general anti-abuse rule (GAAR) that will come in the next year, there will be an advisory panel on its application, made up of a mixture of HMRC and non-HMRC people. How useful it is will depend on who is on it. But first, we must be clear about what it is supposed to do.

The panel will look at written submissions from HMRC and the taxpayer, and write a response that says whether use of the GAAR may be appropriate, and (one hopes) why. It will not decide whether the GAAR in fact applies, nor will its view bind either party. It will not perform any kind of judicial function. It will also publish reports on its work, and will contribute to the development of guidance.

We clearly need tax experts on the panel. The schemes that the panel considers will be very complex, and there is not likely to be any useful role for lay people without technical expertise. We must also have people who do not have the HMRC mindset. The group of panellists that considers a given case must include private sector practitioners. But should we have HMRC people on the panel at all?

Yes, we should. An HMRC representative would not be both advocate for HMRC and judge, because there will be no judicial function to perform. If HMRC was not represented, tax officials would rapidly lose confidence in the panel, because some of the private sector members would be suspected, rightly or wrongly, of having a financial interest in the tax avoidance business. And the public would lose confidence in the GAAR, for the same reason.

We can expect the HMRC members to be among the more hawkish officials, but the private sector members should be able to stand up to them. And the taxpayer may learn something useful from hawkish comments. Perhaps he or she will see a weakness in the avoidance scheme, and will settle quickly rather than go through the courts.

We must, however, be able to see how the panel works. The government is wrong to limit it to publishing summaries of its work. All individual decisions should be published, suitably anonymised, along with the comments of the panel, attributed to 'HMRC' or to 'a private sector member'. Moreover, we must all watch like hawks, lest the advisory panel's contributions to the published guidance get written primarily by HMRC officials.

Paying informants

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What HMRC could learn from the UBS/Birkenfeld experience.
The recent payout to UBS former banker Bradley Birkenfeld has drawn attention to the dramatic discordance between amounts paid to tax informers in the UK and the level of awards made in the US. According to figures recently released by HMRC, the $104m paid to Birkenfeld by US tax authorities for his whistleblowing activity eclipsed the total amount paid by HMRC to tax informers during the tax year 2011/12 by a ratio of over 100 to 1. Mindful of the $100bn a year which the US rewards scheme collects, it is high time HMRC reconsiders its policy in this area.

As long ago as 1868, Parliament gave its approval to the Commissioners of Inland Revenue to financially reward a person who informed them about a revenue offence. Today, HMRC's discretion is couched more widely. Under the Commissioners for Revenue and Customs Act 2005 s 26, a reward can be paid to any person 'in return for a service which relates to a function of the Commissioners or an officer of Revenue and Customs'.

In contrast to the US system, the approach taken by HMRC to discretionary payments remains informal and there is no statutory framework for determining the level of payment which is to be awarded. Moreover, whereas in the US it is not unusual for tax informers to be identified, the UK prefers to preserve an informer's anonymity. Conventional wisdom suggests that anonymity encourages informers to come forward, although one wonders whether, in the present climate of austerity, a more generous level of award might prove more persuasive notwithstanding an informant's identity becoming known in some instances. In reality, it is very difficult (though not impossible) for the CPS to prosecute a fraudulent taxpayer in a case where there is an informer without disclosing the informer's identity, the nature of the information provided and the amount of reward received.

Interestingly, the possibility of introducing radical whistleblowing reward provisions into English law was mooted in May 2005 when the Home Office published its asset recovery action plan. Under this proposal, a citizen would be encouraged to bring a claim on the government's behalf where he is aware of a past or present fraud. The government could decide whether or not to intervene in the action, and if successful the whistleblower would secure a share of between 15% and 30% of the recovered monies, depending on the circumstances of the case. These claims, known in the US as 'qui tam' actions, owe their origin to a law dating back to 1790 when private citizens were authorised to sue on behalf of the Federal government. The claims are not limited to revenue cases and unsurprisingly they have proved very popular. In the 19 years between 1986 and 2005 there have been over 5,000 actions leading to $11bn being awarded in judgments, of which $10bn has come from cases in which the government has intervened.

While a citizen's involvement as claimant in an asset recovery action may be too highly spiced for the British palate, on any view there are obvious lessons which HMRC could learn from the UBS/Birkenfeld experience.

Cost-sharing exemption: effective reorganisations

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The implementation of the cost-sharing exemption into UK law provides numerous opportunities for not-for-profit organisations to achieve economies of scale through collaboration, without incurring the additional VAT cost usually associated with outsourcing.

The cost-sharing exemption (CSE) originates in EU VAT legislation and despite being mandatory, for EU Member States, only became part of UK law through the implementation of Group 16 to VATA 1994 Sch 9 on 17 July 2012. This followed a prolonged lobbying effort by the third sector and other organisations. The purpose of this new provision is to allow organisations which cannot recover all the VAT they incur to share costs, achieve economies of scale and improve efficiencies without incurring additional VAT costs.

Given the current economic and political environment, this measure assists greatly with cost reduction, supporting the government's 'big society' agenda and the move towards divestment of public services into the third sector. Whilst outsourcing works well for fully taxable businesses, for other organisations the VAT generated on supplies between outsourcer and recipient can significantly reduce or even remove any headline cost benefit. As a result, many organisations undertaking VAT-exempt and non-business activities are deterred from restructuring, reducing their ability to scale up and take on the delivery of key services. Removing this barrier is a welcome step in assisting organisations that do not enjoy full VAT recovery to take advantage of available opportunities.

How significant a step, clearly depends upon how easy it is for a group of organisations to establish a cost sharing group and utilise the CSE. The legislative provisions closely resemble Article 132(1)(f) of Council Directive 2006/112/EC from which it is derived and, in isolation, give little insight into how cost sharing groups should be structured or how the exemption will work in practice. HMRC's recently published supporting guidance (*VAT Information Sheet 07/12*, available at lexisurl.com/G8AKD) should be viewed positively as the document provides significant clarification on a number of key points. Critically, the document indicates HMRC's apparent willingness to accept pragmatic application of the rules where appropriate (for example in relation to the 85% test for 'directly necessary' services and the non-prescriptive approach to the monitoring processes the cost sharing entity is required to put in place for the use of its supplies and their VAT treatment).

HMRC's insistence that the cost sharing entity is a separate taxable person may limit the applicability of the CSE without the need for restructuring, which in a cash strapped sector is unfortunate, as is the limit of the 85% test particularly in relation to back office services (which are likely to be used by organisations for more than 15% taxable use). As both points formed part of the sector's lobbying on this issue, the result is disappointing. However, the flexibility given by the guidance offers the opportunity for organisations to ensure that establishment of any cost sharing group is tailored to their needs within the confines of the legislation and the restrictions outlined in the *VAT Information Sheet* and, more importantly, helps to achieve their strategic objectives for future growth and development.

As HMRC states in the guidance itself at paras 5 and 39, the current infraction proceedings being undertaken against other Member States in relation to the CSE may result in necessary changes to HMRC's interpretation of the exemption. While HMRC has given a strong indication that any resultant changes should be prospective in nature and will be subject to some form of transitional arrangements, it is likely that any future change will restrict rather than widen the application of the exemption. On this basis it may be wise to consider the potential application of the CSE sooner rather than later in order to maximise the VAT benefit available.

The expectation is that niche cost sharing entities will be established providing specific services (eg, payroll support or IT services), should assist organisations to acquire quality services as members of numerous cost sharing groups on a competitive basis.

For the CSE to be most effective, it is best utilised as an enabling mechanism to support organisations in coming together as a group of independent persons to form a 'cooperative self supply' arrangement, a term used by the EU Commission and quoted by HMRC in the guidance, becoming more efficient, effective and streamlined in managing costs therefore better placing them to take advantage of the opportunities presented under the 'big society' agenda.