MACFARLANES

LAST CHANCE TO COME CLEAN

NEW DISCLOSURE FACILITY AND REQUIREMENT TO CORRECT PAST NON-COMPLIANCE

CRACKING DOWN ON TAX EVASION AND AVOIDANCE

The Government and HMRC have, over the last two or three years, dramatically stepped up their fight against tax evasion (which is illegal) and their attempt to discourage / penalise tax avoidance (which is legal but is the subject of negative public sentiment). There has been a particular focus on offshore matters.

Specific measures include the following:

- establishing a new multi-agency task force to tackle offshore tax evasion;
- automatic exchange of financial information on a global basis under the Common Reporting Standard agreed by over 100 countries;
- registers of beneficial ownership of companies and trusts, some of which will be public and some of which will be exchanged automatically between governments in the same way as financial information;
- a new criminal offence for failing to declare offshore income / gains without a reasonable excuse – this covers pure mistakes as well as tax avoidance / evasion;
- increased penalties for offshore non-compliance – in the most serious cases, this can be up to 200 per cent of the underpaid tax plus 10 per cent of the value of any underlying asset;
- new penalties for advisers / intermediaries and other service providers (for example, trustees) who knowingly enable offshore non-compliance; and
- a corporate criminal offence for corporates which fail to prevent their employees from facilitating tax evasion.

Additionally, the Government has recently announced proposals to introduce new penalties for advisers, intermediaries and other service providers (again, including trust and company service providers) who benefit financially from enabling clients to put in place tax avoidance arrangements which end up not working (whether because a court finds against the taxpayer or whether the taxpayer simply decides not to fight any HMRC argument).

REVISITING THE PAST

The Government has announced that it will:

- put in place a final disclosure facility for people who have not paid all of the tax which they should have done on their offshore assets;
- impose a "requirement to correct" past offshore non-compliance (i.e. paying less tax than is legally due); and
- impose tough new penalties on those who do not come forward as a result of these two measures and who are subsequently found not to have paid enough tax on their overseas income and assets.

WORLDWIDE DISCLOSURE FACILITY

This final offshore disclosure facility began on 5 September 2016. No special terms are offered. Taxpayers will have to pay the full amount of tax, interest and penalties which are due.

The Government's rationale for this is that, as a result of some of the measures mentioned above, such as the automatic exchange of financial information and public registers of beneficial ownership, it will have access to unprecedented amounts of information and so will be able to catch defaulters even if they do not come forward. There is therefore no reason for these people to be offered any special incentive to own up.

In addition, there have been opportunities to disclose made available in the past (for example, through the Liechtenstein Disclosure Facility) and no doubt the Government feels that those who did not take advantage of such disclosures deserve no special treatment.

The main benefits of making a disclosure under the worldwide disclosure facility rather than waiting until the "requirement to correct" described below starts to apply in April 2017 are as follows:

- any penalty is likely to be lower as HMRC will in most circumstances allow the maximum discount for the quality of the taxpayer's disclosure. There are however exceptions to this where the non-compliance took place more than three years ago or the taxpayer could have come forward under a previous disclosure facility but failed to do so. However, even in these circumstances, the penalty will still be significantly less than the maximum which HMRC could charge.
- In complex cases, there will be the ability to ask for HMRC's view on how any liabilities should be calculated.
- In most cases, HMRC is likely to accept the disclosure without a detailed enquiry.

Disclosure under the worldwide disclosure facility does not guarantee immunity from criminal prosecution. There are detailed requirements which have to be satisfied including an undertaking to make full disclosure of all previously undisclosed

UK tax liabilities (both offshore and onshore) and for the taxpayer to self-assess whether his non-compliance was wholly innocent, careless or deliberate. There are warnings that any mistakes in the taxpayer's disclosure could lead to further civil or criminal investigations as well as higher penalties.

In addition, the taxpayer is required to disclose the maximum value of all assets held outside the UK over the last five years including trust interests.

It is perfectly possible to make a disclosure to HMRC outside the terms of the worldwide disclosure facility. This would avoid the strict requirements of the disclosure facility but with the risk that HMRC will, as a result, open a more detailed investigation into the taxpayer's affairs.

REQUIREMENT TO CORRECT PAST OFFSHORE NON-COMPLIANCE

This is going to affect anybody who has offshore income, gains or assets.

Overview

The new rules will apply to all taxpayers, whether individuals or companies and will catch any underpayment of income tax, capital gains tax or inheritance tax whether as a result of evasion, avoidance, tax planning which does not work, carelessness or purely innocent mistakes.

Taxpayers will have a window of opportunity between 6 April 2017 and 30 September 2018 to report any past offshore non-compliance. As with the worldwide disclosure facility, the taxpayer will have to pay any tax, interest and penalties in full.

Taxpayers will be expected to disclose any UK non-compliance at the same time as the offshore non-compliance is reported.

The requirement to correct will itself cover UK non-compliance if the proceeds of that non-compliance have been moved offshore.

How far back do I have to go?

The requirement will apply to the tax year 2015 / 16 and earlier tax years.

How far back you have to look depends on whether an assessment by HMRC would be in time. Broadly speaking, this means:

- four years for innocent mistakes (i.e. the tax year 2012 / 13 onwards);
- six years if the taxpayer has been careless (2010 / 11 onwards);
- 20 years where the loss of tax has been brought about deliberately (1996 / 97 onwards); and
- in the case of inheritance tax where no previous tax return has been made in relation to the liability in question, the normal time limit is 20 years (even for innocent or careless conduct) and there is no time limit at all if the conduct is deliberate.

The question as to whether HMRC is out of time for making an assessment will be considered as at 6 April 2017 and not at a later date, even if the disclosure is not made until, say, September 2018.

The Government is proposing that HMRC should be given a one-off five year extension to the normal time limits for making assessments after the requirement to correct window closes at the end of September 2018. The purpose of this is to discourage people from failing to come forward in the hope that one or more years of assessment will drop out of account by the time HMRC catches up with them. It is also intended to give HMRC time to review the information which it will be receiving under the Common Reporting Standard and still be in time to make an assessment.

Although it is not clear, we assume that this extension to the time limit for assessments will not enable HMRC to go back and assess a year earlier than that which is covered by the requirement to correct outlined above.

What if I do not correct any offshore problems?

As a result of the various transparency initiatives discussed above, HMRC may well become aware of a taxpayer's overseas income or assets. This will no doubt lead to more investigations which could bring to light:

- tax evasion;
- tax planning strategies which HMRC takes issue with; or
- mistakes or oversights such as forgetting to report income from an offshore bank account or an overseas rental property; inadvertent remittances to the UK by non-domiciliaries; failure by trustees to notice a requirement to report a 10 year inheritance tax charge for a trust; or overlooking the requirement for offshore trustees to report and pay tax on UK source income where the trust has UK beneficiaries.

Leaving aside the question as to whether the proposed new criminal offences relating to offshore matters (which are only disapplied where there is a reasonable excuse for any failure) might apply, the consequence of failing to identify and report any problems during the "requirement to correct" window will be that the taxpayer will face significant additional penalties compared to those which would normally apply.

The Government is consulting on the design of the penalty regime for what they are calling a "failure to correct" but the proposals in the consultation paper suggest penalties of up to 200 per cent of the underpaid tax, plus a penalty of up to 10 per cent of the value of any offshore assets where the underpaid tax is more than £25,000. There would be an additional 50 per cent increase in the amount of the penalties if HMRC is able to show that assets have been moved in an attempt to avoid reporting either under the Common Reporting Standard or under the requirement to correct.

Liability for a penalty can be avoided if the taxpayer has a reasonable excuse for not having complied with the requirement to correct before 30 September 2018 but there is more than a hint that what qualifies as a reasonable excuse will be tightly drawn.

WHAT SHOULD TAXPAYERS WITH OFFSHORE INCOME OR ASSETS BE DOING?

Given that the sanctions for a failure to correct will apply, even to a perfectly innocent failure to pay the right amount of tax, taxpayers with offshore income or assets need to review their past tax compliance.

Clearly taxpayers will know whether they have deliberately failed to pay tax which is due. They should come forward under the worldwide disclosure facility which started on 5 September.

More difficult is the position of taxpayers who have, over the past few years, undertaken tax planning which has offshore elements. It would be sensible for advisers to be asked to review such arrangements to ensure that nothing has changed which might cast doubt on whether the planning works. Some taxpayers may wish to disclose even straightforward arrangements simply to ensure HMRC has the relevant information.

For those taxpayers who have offshore income or assets but have not taken any advice on their tax position or whose advisers are not fully conversant with all of the offshore anti-avoidance provisions, it is essential that a health check is undertaken as soon as possible so that any potential problems can be identified in good time. Failure to do so could not only cause problems under the "failure to correct" penalties but could also lead to criminal sanctions, as HMRC is unlikely to accept that there is a reasonable excuse for any underpayment of tax where no or insufficient advice has been taken.

Even where clients have been properly advised, they should consider whether there might have been any inadvertent failure to comply with their obligations. In more complex situations, perhaps involving offshore structures, it would be worth considering whether the taxpayer's advisers should be asked to review the position in order to identify any issues. Even if a problem subsequently comes to light, this is at least likely to mean that the taxpayer has a reasonable explanation for any failure to correct the non-compliance and would not therefore be liable for any additional penalty, nor face the prospect of any criminal sanctions.

We are living in a new world as far as both tax planning and tax compliance is concerned. Taxpayers face both criminal and civil penalties if they get it wrong. Service providers will also be in the firing line with penalties linked to the amount of underpaid tax.

If care is taken both in the initial planning and the ongoing administration of any structures, there is nothing to worry about. However, those without the required expertise, who cut corners or who turn a blind eye, are likely to face ever increasing problems.

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