

Getting offshore tax right

Anton Lane examines the implications and subtleties of HMRC's drive to help 'taxpayers get offshore right'

Lurking behind the consultation 'Helping taxpayers get offshore tax right' is a mechanism to systematically target and penalise those that don't, including professional advisers. It's a must-read for those with offshore assets, advisers with client's holding offshore assets or those advising on offshore matters.

HMRC published a discussion document on 23 March 2021 entitled 'Helping taxpayers get offshore tax right' (the closing date for comments was 15 June 2021). The proposals in that document indicate the ability HMRC have to identify those with offshore assets and to proactively encourage tax compliance.

Having offshore assets, income or gains is not naughty but it can be. The tax problems with 'offshore' that have arisen over decades include (but are not limited to):

Misunderstanding of the UK tax treatment.

Wrong understanding of domicile or the tax treatment of a non-UK domiciliary.

Not appreciating the transfer of assets abroad legislation and when it applies especially when there are associated operations.

Believing there is an available commercial exemption from anti-avoidance legislation.

Using an avoidance scheme that utilises an offshore fiduciary and not understanding the tax treatment of subsequent transactions within such a structure.

Advice provided by persons who are not genuine specialist dealing with the complex anti-avoidance legislation that applies to such structures.

The discussion document frames the rationale for the proposals: "HMRC have had particular success acting against those who have sought to avoid or evade their offshore tax obligations or helped others to do so. Since 2010, the UK Government has secured and protected over £3 billion from initiatives focused on offshore non-compliance."

I am always cynical when HMRC identifies their successes combatting avoidance and evasion. While they may come across as appearing helpful, I can't help but wonder whether there is another motive, for example to target those who continue to get it wrong and of course professionals assisting them to get it wrong! Remember:

Finance Act 2013 introduced the following provisions:

Section 162: penalties for enablers of offshore tax evasion or non-compliance.

Section 163: penalties in connection with offshore matters and offshore transfers.

Section 164: offshore tax errors etc: publishing details of deliberate tax defaulters.

Section 165: asset-based penalties for offshore inaccuracies and failures.

Section 166: offences relating to offshore income, assets and activities.

The 2015 Budget set out the intention to introduce a new strict liability criminal offence for offshore tax evasion.

Finance Act 2016 introduced civil penalties for enablers of offshore tax evasion. The penalties came into force on 1 January 2017 and an equivalent corporate offence of failure to prevent the facilitation of tax evasion was introduced from 30 September 2017.

The Finance Act 2016 also provided several sanctions against tax avoidance and evasion.

Careless and not deliberate?

Interestingly and maybe quite helpfully, the document accepts that offshore tax non-compliance may not be deliberate and may be caused by:

Not being aware of offshore tax obligations.

Guidance and communications not being relevant or clear.

Reliance on anecdotal evidence or out-of-date advice.

Not asking for help and support until the tax return is due.

If HMRC accepts that offshore tax non-compliance may not be deliberate, the minimum 100% penalty would appear even more unreasonable than when introduced. The minimum penalty infers that any person within the scope of UK tax should take exceptional care to get their tax relating to offshore matters correct. Whereas, had the same person limited themselves to UK matters, they would have the ability to have no penalty in certain circumstances and considerably less than 70% (or even 30%) in most circumstances.

The use of data

HMRC have had apparent significant success using data to find those who have not declared the correct amount of UK tax. The nudge letters prompting disclosure to those holding offshore assets demonstrates the use of data accessible by HMRC. HMRC interventions have resulted in £3.3 billion of tax, onshore and offshore, in 2017 to 2018. The offshore data available to HMRC has been largely received from the common reporting standard, which over 100 jurisdictions have committed to automatically exchange financial account information: "In 2019 HMRC received information on 7.6 million offshore financial accounts held by UK resident individuals, and the entities they control."

HMRC are not just intending to use this data to investigate those with offshore assets although you have to admit it highly likely they want to. HMRC want to prompt taxpayers with offshore assets to get their compliance right. They also want to prompt their agents. We have to consider the ability to prompt against a failure to disclose income or gains on an SATR and of course the enablers of offshore tax avoidance or non-compliance.

The prompts being suggested, include using data to remind taxpayers:

Of the requirement to notify chargeability.

When HMRC send them a notice to file a tax return that they have assets or income overseas.

By using online prompts when they are completing their tax returns, that HMRC collect data of offshore assets.

To declare income and gains from the assets HMRC know they hold in particular countries.

The proposals also include telling authorised agents about the information HMRC hold on their clients' offshore income or assets.

HMRC also identify that the data may be used to:

Identify trusts where an inheritance tax 10-year anniversary charge may arise and remind the trustees.

Assist those managing a deceased person's estate by providing them with information on offshore assets held by the deceased.

Further proposals regard the educating of taxpayers to:

Recognise when offshore income or assets may lead to UK tax.

Understand what must be included in a self-assessment return,

Collate the information needed to allow a return to be completed accurately.

Understand that they must tell HMRC if tax is due, where they have not been asked for a return.

During completion of a return, helping taxpayers to complete the return correctly, for example, by reminding them of offshore income HMRC is aware of that should be declared.

After the return is submitted, helping to ensure taxpayers are confident the return has been completed correctly, and understand how much tax to pay and when.

While the above proposals appear to be targeted at specific taxpayers HMRC will hold information on, HMRC also propose to communicate to the public, and:

Highlighting common mistakes in high-risk areas for offshore tax.

Targeted awareness raising by contacting taxpayers in certain jurisdictions, and sectors, where mistakes are more common.

HMRC doing more to debunk myths that exist about what is and is not legal.

Developing an offshore assets 'one-stop-shop' for offshore guidance.

Improving the guidance on completing the foreign pages of the self-assessment tax return.

Working with agents and other intermediaries to identify common errors, and opportunities for joint communications and action.

Increasing awareness of the scope and effectiveness of anti-avoidance legislation for both individuals and corporates, to deter the use of avoidance schemes.

The consultation also suggests that "knowing who has given advice to a taxpayer before or with the return they submit may help inform HMRC's risk assessment of the accuracy of the return. It could also provide HMRC with data which will help us

better understand the quality of advice being given to taxpayers by particular agents, and the interpretations of tax law being adopted by agents”.

There are further considerations to better promote offshore tax compliance through financial intermediaries and maybe the financial sector encouraging best practice, or by providing guidance and education. HMRC wish to explore how IT in the financial sector could help support their get their tax affairs right first time.

Conclusion

If you prompt a taxpayer and or an agent and they maintain non-compliance, the case for deliberate conduct and invoking the legislation against enablers of offshore tax evasion or non-compliance appears more certain. Deliberate conduct at best results in higher penalties but at worse imprisonment.

The offshore criminal offence for taxpayers omitting offshore items from their tax returns does not require proof of intent but merely an omission from the return. With that in mind, maybe the prompting has no real effect on whether HMRC invoke the criminal offence.

However, it may be more 'justified' where HMRC can demonstrate the taxpayer was place in knowledge. Similarly, professionals placed in the know but who fail to act on the know, could be 'blacklisted' and authorisation to act revoked. HMRC also intend to work more closely with professional bodies!

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