Careful steps

Management of taxes | Professional standards

01 November 2017

Jon Preshaw considers the new provisions for sanctioning enablers of evasion and offshore non-compliance, and looks at the new steps for advisers

Key Points

What is the issue?

New legislation introduced in last year's FA imposes civil penalties on those who 'enable' offshore non-compliance. These rules are wider in scope than the new

offence of failing to prevent the facilitation of tax evasion.

What does it mean to me?

The provisions can apply in a broad range of circumstances and advisers will need to consider the extent to which their own position, as well as the position of their clients, is impacted.

What can I take away?

The provision raise significant challenges for advisers when they act for clients making disclosures to HMRC where the issue involves an offshore matter. Careful consideration will need to be given to the extent to which a conflict of interest may arise. The rules present risks for those advising on offshore matters more generally. Processes should be put in place to ensure that any penalty risk is addressed.

There has been considerable discussion in the professional press and the media more generally about the new penalties and criminal sanctions which have been introduced to deal with those who ‘facilitate’ tax avoidance or tax evasion. Particular focus has been given to the Criminal Finance Act 2017 provisions which impose criminal liability where there has been a failure to prevent the facilitation of tax evasion.

Responsible advisors may feel that these measures should be of no concern to them, however, they can apply in a broad range of circumstances where the advisor will wish to ensure they act professionally and of course advisors may need to advise their own clients who themselves may need to take account of them.

One key measure which has been subject to less discussion is at Schedule 20 Finance Act 2016. Schedule 20 introduced civil penalties which can apply to advisers in circumstances where their clients fail to comply with their tax obligations. The penalties apply in respect of conduct which takes place after 1 January 2017. The measures form an important part of HMRC’s broader efforts to combat offshore tax evasion and sit alongside the criminal sanctions which were introduced for failing to prevent the facilitation of tax evasion in Criminal Finances Act 2017 and the civil penalties which are to be imposed for failing to correct historic offshore errors which are to be introduced in the Autumn Finance Bill. The Schedule 20 penalties could apply in some of the same circumstances as the Criminal Finances Act provisions,

but they do not overlap precisely.

How do the provisions apply?

Schedule 20 provides that a person ('P'), which would include an individual or body corporate, will be liable for a penalty where that person has enabled another person ('Q') to carry out offshore non-compliance. The penalties apply where the non-compliance involves income tax, capital gains tax or inheritance tax. Although there was some discussion as to whether the provisions should extend to include corporation tax during consultation on the measures, it appears that a decision has been made that, for the time being at least, this will not be the case.

Non-compliance is defined as conduct which constitutes a relevant tax offence (cheating the public revenue, fraudulent evasion of income tax or the new strict liability offences at s106B-D TMA 1970) or conduct which would give rise to a tax penalty for either carelessly or deliberately;

- failing to file a tax return,
- failing to notify chargeability, or
- filing an incorrect return or other document with HMRC.

Before the Schedule 20 penalties can apply, it is necessary for a taxpayer to have been convicted of the relevant criminal offence, to have been assessed to the penalty, or to have entered into a contract settlement with HMRC which includes the penalty.

The reference here to civil tax penalties is significant. This means that, unlike the provisions in the Criminal Finances Act 2017, the Schedule 20 penalties can apply where a taxpayer carelessly, rather than deliberately, fails to comply with their tax obligations.

Some key definitions and scope

Conduct involves an offshore matter where it involves an offshore asset, offshore income or offshore gains, where income or gains are treated as arising offshore, or where there has been a transfer of assets offshore or between offshore jurisdictions. The provision could therefore apply to a broad range of circumstances where either offshore income or gains are realised by clients or are treated as arising under a

variety of complex anti-avoidance provisions.
‘Enable’ is not specifically defined in the legislation and so must be assumed to take its ordinary meaning, being “to make someone able to do something, or to make something possible”. As a result, the conduct which can give rise to a penalty will encompass a wide range of behaviour including both acts and omissions.

The potential scope of the provisions are narrowed somewhat by the requirement that P must have known that their actions would, or would be likely to, enable the offshore non-compliance. It therefore appears that it will not be possible to enable offshore non-compliance carelessly. However, it is also clear that it will not be necessary for P to have specific knowledge that their conduct will give rise to specific non-compliance.

A further key difficulty with the definitions is that the provisions clearly indicate an adviser could be liable to a civil penalty in circumstances where their client carelessly, rather than deliberately, failed to comply with a tax obligation.
In these respects, the Schedule 20 penalty regime contrasts with the provisions in the Criminal Finances Act 2017, which require there to be a criminal act of facilitation and a criminal act of tax evasion before the offence is triggered (with the requisite knowledge and intent in both cases).

Consequences of the application of the regime

In the event that the penalty provisions apply, there are a series of consequences:

- A tax-geared penalty will be chargeable.
- P’s details may be published in the event that the Potential Lost Revenue (the amount on which the penalty calculation is based) exceeds £25,000.
- Where P is a company, the provisions at s108 TMA 1970 can apply to transfer liability for the penalty to an officer of the company.

The Potential Lost Revenue here will be calculated by reference to the error which has been enabled. The penalty itself is the greater of 100% of the Potential Lost Revenue or £3,000, with a further penalty of the greater of 50% of the Potential Lost Revenue or £1,000 where a penalty under Schedule 21 FA 2015, in respect of an offshore asset move, has been levied. Normal appeal rights apply in respect of the penalty, but there is no specific right of appeal against the decision to publish P’s details, which would clearly have very significant reputational consequences.

Broadly, in line with other civil penalty provisions, the penalty can be mitigated to the extent that P discloses information about the non-compliance to HMRC or assists HMRC in an investigation which leads to Q being charged with a relevant criminal offence or a civil tax penalty. However, the penalty cannot be reduced to less than the greater of 10% of the potential lost revenue (where disclosure is unprompted) or £1,000, or 30% of the potential lost revenue (where disclosure is prompted).

How are HMRC likely to apply the provisions?

It can be expected that HMRC will seek to apply these penalties more frequently than the criminal sanctions in the Criminal Finances Act 2017. This is because the provisions require a civil standard of proof to be applied and it appears that the threshold conduct which will give rise to sanctions under Schedule 20, enabling offshore non-compliance, dos not involve the same level of knowledge and intent as the sanctions under the Criminal Finances Act 2017. It could therefore be anticipated that the civil penalty regime will be less resource-intensive for HMRC to apply than the criminal sanctions.

It would be prudent to assume that HMRC will consider whether to apply the penalties in any instance where a taxpayer is subject to a tax-geared penalty in connection with income tax, capital gains tax or inheritance tax, and where the liability arises in connection with offshore assets, income or gains. The outline disclosure forms which taxpayers are required to complete in order to formally accept HMRC’s offer under the Contractual Disclosure Facility (‘CDF’) process now specifically requires details of other parties involved in the tax fraud which is disclosed, which will include those who provided assistance to the taxpayer. The information supplied in CDF outline disclosures is likely to form the basis for much of HMRC’s compliance activity around enablers and facilitation.

It is also worth noting that there is no specific reason why the provisions could not apply extra-territorially. The imposition of a penalty on a non-UK resident would be unusual given the difficulties in enforcing it. However, HMRC may well regard the ability to publish the details of a non-UK provider as a useful tool in their wider efforts to combat offshore non-compliance. With that in mind, it may well be the case that HMRC seek to apply the provisions in connection with enablers based outside the UK.

Specific implications for advisers

The provisions raise significant challenges for advisers when acting for clients who are either making disclosures to HMRC in respect of offshore non-compliance, or where HMRC allege that such offshore non-compliance has taken place. In such circumstances, there is a risk that the adviser could be subject to penalties under the Schedule 20 regime. As a result, the adviser will need to consider the extent to which the provision of information to HMRC about their own firm's conduct will impact on any Schedule 20 penalty which might arise. Such situations could give rise to a conflict of interest between an adviser and their client. The CIOT's guidance on the new Criminal Finances Bill addresses this issue in the context of the Criminal Finances Act provisions. The guidance indicates that advisers should very carefully consider their position in the event that a risk of conflict might arise, and should refer matters on to another adviser in appropriate circumstances. It is certainly clear that equal consideration should be given to the risk of conflict arising as a result of these civil penalty provisions

More generally, consideration should also be given to the extent to which advisory work in connection with non-UK income, assets or gains could give rise to the risk of penalties for an adviser. The provisions will only apply where Q knew that their actions were, or were likely to, result in offshore non-compliance. In circumstances where Q is an advisory firm, and where 'reasonable prevention procedures' for the purposes of the Criminal Finances Act 2017 offences were in place and being applied consistently, it seems unlikely that the requisite knowledge could be demonstrated. Therefore, although there is much around the legislation which is unclear, it would certainly appear to be a worthwhile practical step for advisers to consider the extent to which Criminal Finances Act 2017 'reasonable prevention procedures' could be extended to mitigate the risks around Schedule 20 penalties.