Requirement to Correct

Management of taxes | Tax voice

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John Cassidy highlights the importance of the recently enacted provisions

HM Revenue and Customs (HMRC) has focused heavily on offshore matters in recent years, but believes that a huge amount of tax remains uncollected. With that in mind it seems a little odd that, until Finance (no 2) Bill 2017 as originally issued, there was no tax legislation which specifically required such tax irregularities to be corrected. That is all set to change now that the 'Requirement to Correct' (RTC) rules have become law as the Finance (no 2) Act 2017 received Royal assent on the 16th November 2017. Although the draft provisions were among those removed from the Finance Bill in the pre-election cull, they were reintroduced as they had already been through the full consultation process with cross-party support. RTC provides new opportunities for HMRC to collect extra tax.

To help HMRC tackle this, a vast amount of data relating to interests in offshore assets such as bank accounts and trusts is heading HMRC's way under the Common Reporting Standard (CRS). HMRC is then expected to pour resources into investigations to try and unearth additional tax.

Anyone then found with tax to pay, but who has not corrected under RTC rules, will be subject to draconian new penalties.

What is the RTC?

RTC applies to anyone who, at 5 April 2017, has under-declared tax linked to offshore matters and creates an obligation to correct matters before 30 September 2018, being the end of the period during which the late adopting countries will provide huge amounts of data to HMRC under the CRS, to which over 100 countries are signed up. Once that data has been received, HMRC will be fully aware of what offshore assets are held and will therefore be able to ask relevant questions of the taxpayer in order to try and unearth additional, previously under-declared tax. A 'Failure to Correct' (FTC) penalty will apply if additional tax is found to be due.

Taxpayers therefore have a window to find and rectify any problems before September 2018, a key message HMRC has tried to convey by stating strongly that taxpayers with offshore affairs should get them independently reviewed without delay, for example:

- Drive taxpayers with offshore interest to review their affairs.
- May not realise they are not paying the right amount of tax.
- May include structures which were compliant… but are not now.

In view of the draconian penalties proposed, advisers should make sure their clients are aware of the RTC and recommend that potentially affected clients should commission an independent review of their offshore affairs. It may be that practitioners are not aware that a particular client has offshore assets because it has never been relevant to the particular role, so advisers should ensure as many clients as possible are apprised of these developments.

FTC penalties

HMRC's further document published in December 2016 reiterated the strong message that '*acting early is vital*' and also referred to the '*toughest possible*

sanctions' for those who do not take action.

Under the FTC regime the existing penalty regime will be replaced by a substantial penalty of **200%** of any additional tax, although this can be reduced to **no lower** than 100%. Hence, those affected will have to pay tax, interest and at least 100% of the tax again. There is therefore a huge incentive to find and correct any offshore irregularities now, under the normal penalty regime.

In addition, FTC penalties will not only apply to current and future tax years, but to **all** offshore irregularities, no matter when they occurred as long as the period in question is still within the assessing time limits.

In some cases there will be even higher penalties, being an asset-based penalty (up to 10% of the offshore assets) and an enhanced 50% penalty where the individual has moved assets around in an attempt to stay one step ahead of HMRC.

Does this only affect tax evaders?

Despite the huge penalties, this is not aimed only at hard core tax evaders using offshore structures or those using sophisticated offshore avoidance arrangements. **All** irregularities are caught no matter what the underlying cause; unlike the existing penalty regime, *there is no behavioural differentiation at all so simple human error or, at the other end of the spectrum, deliberate/fraudulent actions, will be treated the same*. I have seen countless cases over the years where additional tax arose without any nefarious activity, but because of matters such as misunderstandings, the complexity of the law and where the overseas service provider has not kept up with the complex changes to legislation and UK obligations, often seen where trusts are involved. All these will be caught.

It should also be noted that a specific definition of 'avoidance arrangements', albeit given in the context of whether advice can be relied upon, was included in the draft legislation which referred only to circumstances where the main purpose, or one of the main purposes, was the obtaining of a tax advantage. This could therefore easily catch straightforward structures, for example the opening of an overseas bank account in order to benefit from the remittance basis.

Conclusion

I echo HMRC’s message that clients are strongly advised to have their offshore affairs reviewed by an independent expert without delay. Such a review will help quash any penalty on the grounds that the taxpayer had a ‘reasonable excuse’ having engaged a suitable professional to undertake the review that HMRC has been recommending.

Disqualified advice

The independence of any such expert is important. In the past, acting under professional advice has been accepted by the Tax Tribunal as taking reasonable care, hence one would expect any penalty to be quashed in those circumstances. However, on the matter of whether a taxpayer has a reasonable excuse for the tax failure or not, the Finance Bill specifically stated that any advice that is ‘disqualified’ will automatically **not** count. Such advice includes any advice given by an ‘interested person’ which, to paraphrase, includes any person who received any consideration when helping the taxpayer enter into the offshore arrangements, hence advice from the incumbent accountant, tax adviser or lawyer may well be disqualified so a third party review is essential.