Taking the leap

Management of taxes

01 March 2018

Geoff Lewis provides a reminder of the RTC requirements and penalties

Key Points

What is the issue?

The requirement to correct (RTC) creates a new legal requirement for anyone who has undeclared UK tax liabilities involving offshore matters or transfers to disclose the relevant information about their non-compliance to HMRC by the 30 September

2018 deadline.

What does it mean to me?

If they fail to do so they will become liable to a new failure to correct (FTC) penalty.

What can I take away?

The sanctions for not meeting tax obligations when there are offshore issues involved are getting tougher and from 1 October 2018 the penalties will be significantly higher. This means anyone who needs to come forward and correct their affairs should do so as soon as possible. Anyone who needs to check their affairs or take advice should do.

Taxpayers who have income or assets abroad must inform HM Revenue and Customs (HMRC) and pay any tax they owe or they could face new financial penalties from 30 September 2018.

Following the deadline, taxpayers who have offshore tax non-compliance could face a minimum of 100% penalties which could surprise agents and taxpayers who have been accustomed to penalties falling within a range from 0% to 50%.

The new penalties come after Schedule 18 Finance (No. 2) Act 2017 received Royal Assent on 16 November 2017. It contains the Requirement to Correct Certain Offshore Tax Non-Compliance, known as the RTC.

The RTC creates a new legal requirement for anyone who has undeclared UK tax liabilities involving offshore matters or transfers to disclose the relevant information about their non-compliance to HMRC by the 30 September 2018 deadline. If they fail to do so they will become liable to a new FTC penalty.

The standard FTC penalty is 200% but can be reduced to a minimum of 100% to reflect the quality of the disclosure. However, in some circumstances HMRC will also charge the Asset Moves Penalty (Sch 21 FA15) and Asset Based Penalty (Sch 22 FA16) and publish details of those who fail to correct. HMRC will publish details of the factors it will take into account when reducing the FTC penalty before the summer.

This article is not a comprehensive review of all aspects of the RTC and for more information taxpayers and agents should refer to the legislation and HMRC's published guidance.

Background

In the last few years the Government has taken numerous steps to tackle offshore tax non-compliance including increasing penalties for evaders, introducing civil sanctions for deliberate enablers of offshore evasion, investing in HMRC's ability to detect and address non-compliance, and the introduction of new criminal offences for evaders and those who help them.

This action has been taken against a background of greatly increased international tax transparency and co-operation, including the introduction of the Common Reporting Standard under which over 100 jurisdictions will exchange financial account information on residents' investments offshore – valuable information for tax authorities to use to address non-compliance.

Since 2007 HMRC has offered a series of incentivised disclosure opportunities starting with the Offshore Disclosure Facility and following it with the New Disclosure Opportunity, the Liechtenstein Disclosure Facility, and the three Crown Dependency Disclosure Facilities. Each of these offered the taxpayer varying incentives to come forward and make a disclosure, either by offering reduced penalties, limited assessment periods or immunity from criminal investigation or a combination of these.

Since then there has been a global step change in tax transparency, culminating in more than 100 countries signing up to automatically exchange information under the Common Reporting Standard.

In this new environment, HMRC will no longer offer incentives to persuade taxpayers to come forward and will instead put more severe sanctions in place for those who have offshore non-compliance and who fail to come forward before 30 September 2018.

What must be corrected?

In brief a person must correct any 'offshore tax non-compliance' involving Income Tax, Capital Gains Tax or Inheritance Tax (IHT) which has not already been corrected

by 5 April 2017 and that HMRC can lawfully assess on 6 April 2017 (or on 17 November 2017 in the case of IHT).

Tax non-compliance means any of the following:

- A failure to comply with an obligation to give notice of chargeability to income tax or capital gains tax
- A failure to comply with an obligation to deliver to HMRC a return or other document.
- Delivering to HMRC a return or other document which contains an inaccuracy and leads to either an understatement of a liability to tax, a false or inflated statement of a loss, or a false or inflated claim to repayment of tax.

A full list of the documents covered are at paragraphs 8 (3) and (4) of Schedule 18. A notable exclusion from the list is PAYE returns submitted by employers – the RTC does not apply to these.

However only offshore tax non-compliance is covered by the RTC and this is defined as any tax non-compliance that involves an offshore matter or an offshore transfer.

It is important to note the definitions used for offshore matter and offshore transfer are wider than the existing definitions used for deciding which category of penalties a failure or inaccuracy falls into. The RTC definition of an offshore matter is:

The tax non-compliance involves an offshore matter if the unpaid tax is charged on or by reference to:

- Income arising from a source in a territory outside the UK
- Assets situated in a territory outside the UK
- Activities carried on wholly or mainly in a territory outside the UK or
- Anything having effect as if it were income, assets or activities of a kind described above

If something does not involve an offshore matter it will involve an offshore transfer if the income or sale proceeds or any part of them were either received abroad or transferred abroad before 5 April 2017.

The offshore transfer definition varies for IHT and applies when the disposition that gives rise to the transfer of value involves a transfer of assets and if after that disposition but on or before 5 April 2017 any part of the assets, are transferred to a

territory outside the UK.

The fact that on 6 April 2017 HMRC must be able to lawfully assess the liability means that the RTC will cover the years as far back as 2013-14 if the taxpayer has taken reasonable care, 2011-12 if their behaviour was careless and 1997-98 if the behaviour is deliberate. There is a provision in the legislation extending the assessing time limits so HMRC can assess any tax that should have been corrected until 5 April 2021. This means tax within scope of the RTC that is assessable at 6 April 2017 remains assessable until the end of the usual time limit or 5 April 2021. This provision is to ensure that there is no incentive to wait for time limits to expire before correcting.

It is not envisaged any future change to assessing time limits (such as the consultation announced at Autumn Budget 2017 on offshore assessing time limits) will impact the years that must be corrected under the RTC.

What can you do to ensure you don’t become liable to pay the FTC penalties?

The first thing any taxpayer who holds offshore assets or investments or has offshore income should do is check if their affairs are in order. The FTC penalties do not depend on the taxpayer’s behaviour – they apply irrespective of whether the under-declaration of tax is deliberate or whether reasonable care has been taken. This makes it very important that people check their affairs, double check advice they have received was correct and remains correct, and look into issues they might have previously ignored.

After checking their affairs and advice taxpayers should correct any non-compliance. This could include:

- A failure to give notice of chargeability to Income Tax or Capital Gains Tax, by giving the requisite notice to HMRC and also giving HMRC the information that enables or assists it to calculate offshore tax due
- A failure to deliver to HMRC a return or certain other documents, by making or delivering the requisite return or document so that HMRC has the information that enables or assists it to calculate the offshore tax due
- Delivering to HMRC a return or other specified document that contains an inaccuracy, by amending the return or document or delivering a new return or

document so HMRC has the information that enables or assists it to calculate the offshore tax due

Regardless of the nature of non-compliance it can be corrected by providing the required information by:

- Using HMRC's digital disclosure service as part of the Worldwide Disclosure Facility or any other service provided by HMRC as a means of correcting tax non-compliance
- Telling an officer of HMRC in the course of an enquiry, or
- Any other method agreed with HMRC

The taxpayer must supply HMRC with the information it needs to be able to calculate the tax due as a result of the non-compliance. A taxpayer cannot make a correction under the RTC by including information in a tax return for any tax year other than the tax year that the non-compliance relates to.

Where a taxpayer has taken advice about their affairs and finds that there is doubt about whether they have outstanding offshore tax non-compliance they need to take care and ensure they are protected against the possibility of the RTC penalties. There are two ways they can do this.

First they can use the Worldwide Disclosure Facility to provide HMRC with the relevant information without accepting they have unpaid liabilities. Full details about how to do this are included in HMRC's RTC guidance. In brief they would register, submit a disclosure showing they owe no tax and send an email to HMRC in which they would supply more information. If they follow this process correctly HMRC will accept they have made a correction under the RTC. If HMRC do not agree with the taxpayer's analysis and believe an additional tax is due they will contact the taxpayer but there will be no question of a failure to correct.

Another approach is for the taxpayer to seek further advice from someone whose advice will not be disqualified. This must be someone with the appropriate expertise and must take account of the taxpayer's relevant circumstances. If they do this and follow the advice they can rely on it to demonstrate they have a reasonable excuse for not correcting.

What is a reasonable excuse?

A person who fails to correct will not be liable for the RTC penalties if they have a reasonable excuse for not doing so. HMRC will follow existing models and established principles that provide guidance on the application of reasonable excuse. However, RTC legislation specifically states circumstances that cannot be taken to be a reasonable excuse which include:

- An insufficiency of funds is not a reasonable excuse, unless attributable to events outside the taxpayer's control
- Where a taxpayer relied on any other person to do anything, that cannot be a reasonable excuse unless they took reasonable care to avoid the failure
- Where a taxpayer had a reasonable excuse but the excuse has ceased, they are only to be treated as continuing to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased
- Relying on advice that is disqualified

The circumstances in which HMRC will not accept a taxpayer has a reasonable excuse because they followed advice that is disqualified include:

- If the person giving the advice did not have the appropriate expertise
- Where the advice failed to take account of all the taxpayer's relevant circumstances
- If the advice was addressed to, or was given to, a person other than the taxpayer

HMRC has stated it will accept anyone who is a member of a UK-recognised legal, accountancy, or tax advisory body and holds themselves out as experts in the appropriate field will have the appropriate expertise to give advice on UK tax matters.

Advice may also be disqualified if it relates to 'avoidance arrangements' which are defined as 'arrangements as respects which, in all the circumstances, it would be reasonable to conclude that their main purpose, or one of their main purposes, is the obtaining of a tax advantage.'

However, the legislation specifically states arrangements which accord with established practice, and HMRC had, at the time the arrangements were entered into, indicated its acceptance of that practice are not avoidance arrangements. The definition of avoidance arrangements is intentionally wide and means some common transactions could fall within it.

Advice is disqualified when it is given by an interested person or as a result of arrangements between an interested person and the person giving the advice. An interested person is someone who either participated in the relevant avoidance arrangements or who received consideration for facilitating the taxpayer's entry into the relevant avoidance arrangements.

If a taxpayer has entered into 'avoidance arrangements' they should take care that if there is any doubt tax might be due; the advice they are relying on is not disqualified. If it is they will not be able to rely on that advice to show they had a reasonable excuse for not making a correction.

What happens next?

HMRC will publish further guidance in the coming months. Guidance in the early spring will explain precisely what taxpayers must do by 30 September 2018 to meet their requirement to correct. In late Spring HMRC will explain the factors which will be taken into account when considering whether to reduce any penalties that are charged for failing to correct.

The sanctions for not meeting tax obligations when there are offshore issues involved are getting tougher and from 1 October 2018 the penalties will be significantly higher. This means anyone who needs to come forward and correct their affairs should do so as soon as possible. Anyone who needs to check their affairs or take advice should do.

Any comments for HMRC on the RTC should be sent to consult.nosafehavens@hmrc.gsi.gov.uk