A requirement to correct (RTC) – not to be underestimated

Management of taxes Tax voice

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Gary Ashford provides a timely update of the RTC rules

Hopefully all Tax Advisers reading this article are well aware of the obligations and consequences of the Requirement to Correct (RTC) offence with what is a fast approaching deadline of 30 September 2018: shortly after this year’s summer break.

A reminder: what is the RTC

The RTC was introduced in Schedule 18 of the second Finance Act of 2017, and I fear lost some of its impact by the fact that it was withdrawn from the original Finance Act, along with the majority of the other proposed changes, ahead of the General election that was called at such short notice.

The RTC is timed to coincide with final date for compliance with the Common Reporting Standard – the CRS (the OECD Standard for Automatic Exchange of Financial Account Information in Tax Matters).

Under the CRS over 100 countries have signed up to exchange personal financial information, some as early as in September 2017 (including the UK), but the rest by the final date of 30 September 2018.

In the meantime, months after 30 September 2018, HMRC will be holding more personal financial account information than ever before. HMRC already holds significant amounts of personal financial account information from the EU Savings Directive (now Directive of Administrative Cooperation (DAC)), the US FATCA, and also the various Crown Dependency agreements in 2016.

The RTC provides HMRC with a new weapon to be deployed as HMRC sift through the vast amounts of information noted above.

So what is the Requirement to Correct offence?

The RTC requires any person with “offshore non-compliance”, as at 5 April 2017, to correct that non-compliance by 30 September 2018 or face a civil tax penalty of 200% of the uncorrected tax.

The reason why the RTC is particularly nasty is that “offshore non-compliance” effectively extends to any tax matter involving Income Tax, Capital Gains Tax or Inheritance Tax. The RTC affects every day tax compliance matters, where part of those everyday matters relate to an overseas tax.

The legislation

The legislation specifically defines tax non-compliance as meaning any of the following:

1. a failure to notify a chargeable liability under section 7 of TMA 1970 to income tax or capital gains tax,
2. a failure to comply on or before the filing date with an obligation to deliver to HMRC a return or other document (listed in the legislation. The main example is a Tax Return), or
3. delivering to HMRC a return or other document (again listed in the legislation. Again, the main example is a Tax Return) which contains an inaccuracy which amounts to, or leads to –
    1. an understatement of a liability to tax,
    2. a false or inflated statement of a loss, or
    3. a false or inflated claim to repayment of tax.

It is therefore really very important that Tax Advisers do not dismiss the RTC as yet another initiative to catch those who have committed Offshore Tax Evasion. Whilst, there is no doubt, such matters will amount to offshore non-compliance, as stated above, the RTC extends to non-compliance regardless of behaviour.

Assessing Time Limits

An important part of the RTC is that HMRC must be within the appropriate assessing time limit to assess the tax involved.

However, RTC legislation specifically extends the normal assessing time limits, such that HMRC has up until 4 April 2021 to apply the time limits above, effectively providing HMRC an extra four years to review information and still applying the normal time limits that were available as at 6 April 2017.

The RTC penalty

The principal RTC penalty amounts to 200% of the potential lost revenue.

In addition, where the tax involved exceeds £25,000 in any tax year, and the person was aware prior to 5 April 2017 that they had offshore non-compliance to correct and they have not corrected it. This amounts to 10% of the asset linked to the non-compliance.

Where the non-compliance is linked to an asset that has been moved to avoid exchange of information under one of the International Exchange agreements, an additional penalty of 50% of the PLR will also be charged.

Mitigation

There is scope to reduce the penalty, for example by making a disclosure to HMRC. However, where a disclosure is made, the RTC can still not be reduced below 100% of the failure to notify penalty.

Defences against the penalty

The person receiving the RTC penalty has the right to appeal HMRC's decision to charge an RTC penalty, or HMRC's decided amount. Further, no penalty will be charged if a person has a Reasonable Excuse. The legislation states that a lack of funds cannot be used to make a case for a reasonable excuse. The legislation also introduces the concept of Disqualified Advice and that this can also not be used to argue Reasonable excuse.

So what is disqualified advice?

The legislation states that advice is disqualified if:

1. the advice was given by an interested person,
2. the advice was given as a result of arrangements made between an interested person and the person who gave the advice,
3. the person who gave the advice did not have appropriate expertise for giving the advice,
4. the advice failed to take account of all of the individual's circumstances, or
5. the advice was addressed to, or was given to, a person other than the actual person (the person will normally be the client).

The legislation states also that the advice involved amounts to avoidance arrangements, and as with most other legislation defines avoidance as circumstances where it would be reasonable to conclude that their main purpose, or one of their main purposes, is the obtaining of a tax advantage.

It is the also necessary to establish who is an "interested person". The legislation defines the person as being:

1. a person (other than the target individual) who participated in relevant avoidance arrangements or any transaction forming part of them, or

2. a person who for any consideration (whether or not in money) facilitated the target person's entering into the avoidance arrangements.

The concept of disqualified advice brings significant new challenges to the Tax Adviser profession, and we have also seen it brought into the legislation for domestic tax avoidance in relation to the amendments to the penalties for errors legislation.

The practical effect of the legislation is that whilst a client may well have taken perfectly reasonable efficacious advice, that advice will potentially be ignored for the purposes of the RTC, if at some point after 30 September 2018 additional tax is proven to fall due, and consideration needs to be given as to whether an RTC penalty is to be charged.

One can very well imagine a client's thoughts and feelings, at the point they are advised that the advice that was taken is "disqualified". It would therefore seem appropriate to ensure the client is aware that this scenario could arise in the past.

Given the specific wording around both the terms disqualified advice and interested people, one solution might be to seek an independent view of the original advice. In such circumstances, an independent view, should not in itself amount to disqualified advice, as long as the person conducting the review did not participate or facilitate the so called avoidance arrangements.

Correcting Offshore Non Compliance

The legislation sets out how offshore non-compliance can be corrected.

In relation to the specific offences referred to within the legislation; failure to notify, failure to file a Return, or filing an incorrect Return, the legislation sets out that one way to correct matters is simply to notify, file or correct the incorrect document.

However, it also sets out that a correction can be made by

1. using the digital disclosure service or any other service provided by HMRC as a means of correcting tax non-compliance,
2. communicating it to an officer of Revenue and Customs in the course of an enquiry into the person's tax affairs, or
3. using a method agreed with an officer of Revenue and Customs.

Disclosure Facilities

HMRC introduced the Worldwide Disclosure Facility (WDF) on 15 December 2014 to enable taxpayers to notify and rectify historic tax problems. Tax advisers may also recall the various disclosure facilities introduced by HMRC over the last decade, most notably including the Liechtenstein Disclosure Facility (LDF). These facilities provided an opportunity to make a disclosure in return for tax on favourable terms. The WDF still provides the opportunity to make a disclosure, however, it does not include any tax favourable terms. One would suggest that this reflects the public mood on offshore tax matters. Also, of note, is that the WDF will come to an end on 30 September 2018.

Another great advantage of the LDF was that it provided assurance, much sought after in cases of tax fraud (deliberate action), against criminal investigations. Again, no such protection is available under the WDF. Therefore in those cases, consideration should be given to making a disclosure under the Contractual Disclosure Facility (CDF), Code of Practice 9.

Conclusion

It is very important that clients do not look on the 30 September 2018 deadline as a date to start to do something. We have in recent weeks seen a significant increase in HMRC investigations on overseas tax matters, including an increase in criminal investigation work. If a client has an uncorrected tax matter, my advice would be to consider making a voluntary disclosure at the earliest opportunity.