Tackling offshore tax evasion: A Requirement to Correct

A consultation document issued by HM Revenue & Customs

Comments from ACCA
October 2016

ACCA (the Association of Chartered Certified Accountants) is the global body for professional accountants. We aim to offer business-relevant, first-choice qualifications to people of application, ability and ambition around the world who seek a rewarding career in accountancy, finance and management.

Founded in 1904, ACCA has consistently held unique core values: opportunity, diversity, innovation, integrity and accountability. We believe that accountants bring value to economies in all stages of development. We aim to develop capacity in the profession and encourage the adoption of consistent global standards. Our values are aligned to the needs of employers in all sectors and we ensure that, through our qualifications, we prepare accountants for business. We work to open up the profession to people of all backgrounds and remove artificial barriers to entry, ensuring that our qualifications and their delivery meet the diverse needs of trainee professionals and their employers.

We support our 188,000 members and 480,000 students in 178 countries, helping them to develop successful careers in accounting and business, with the skills required by employers. We work through a network of 100 offices and centres and more than 7,400 Approved Employers worldwide, who provide high standards of employee learning and development. Through our public interest remit, we promote appropriate regulation of accounting and conduct relevant research to ensure accountancy continues to grow in reputation and influence. www.accaglobal.com

Further information about ACCA's comments on the matters discussed here can be requested from:

Yen-pei Chen
Manager, Tax and Corporate Reporting
yen-pei.chen@accaglobal.com
+ 44 (0) 207 059 5580

Jason Piper
Senior Manager, Tax and Business Law
jason.piper@accaglobal.com
+44 (0) 207 059 5826

+44 (0)20 7059 5000
info@accaglobal.com
www.accaglobal.com
The Adelphi 1/11 John Adam Street London WC2N 6AU United Kingdom

OVERALL COMMENTS

ACCA welcomes the opportunity to comment on the consultation document issued by HM Revenue & Customs. Perhaps the most fundamental point to note about this particular consultation is that despite the fact it is positioned as part of the 'tackling offshore evasion' programme, HMRC are explicit that "we are looking for the RTC to address all noncompliance irrespective of the underlying behaviour or motivation"[1]. Any model of sanctions created alongside the requirement to correct must therefore recognise that the behaviours encountered in applying the regulation will not necessarily have involved any intention to understate or fail to account for tax.

Definition of tax evaders

There is a large proportion of taxpayers whose non-compliance does not arise from an intention to evade UK tax. Any regulation to combat tax evasion should clearly distinguish between those who act with the intention to evade tax, and those who have unintentionally failed to comply.

In order to encourage those whose non-compliance is unintentional to correct their tax affairs, we would encourage the government to carefully reconsider the design of the Requirement to Correct (RTC) – notably with regards to the method for correcting and the contents of a correction – and to tailor the channel and language of wider public communication about the RTC.

As an example, we believe that one potentially significant category of non-compliant taxpayers has not been given due consideration in the research undertaken by HMRC[2]: UK-resident non-domiciled individuals who maintain funds in their country or countries of origin. These include medium- to low-income workers who come to work in the UK for a number of years and remit their salaries abroad to contribute to their families' income.

This category of taxpayers would be targeted by the proposed anti-tax evasion measures, as the remittance of their UK earnings, and/or the maintenance of

[1] Paragraph 4.6 of the consultation document

[2] Paragraph 3.5 of the consultation document refers to research carried out by HMRC during 2014 into taxpayers with offshore compliance issues. The research focused on disclosure cases via the Liechtenstein Disclosure Facility (LDF) and identified four categories of non-compliant taxpayers: inheritors, non-domiciled, legacy evaders and strategic evaders.

+44 (0)20 7059 5000
info@accaglobal.com
www.accaglobal.com
The Adelphi 1/11 John Adam Street London WC2N 6AU United Kingdom

pre-existing savings overseas, would bring them within scope based on the proposed FA 2007 definition for relevant offshore interests[3]. We note that, although the potential tax loss related to this population is likely to be low, some of their tax affairs may be considered highly complex.

If HMRC's research shows that tax evaders are generally unlikely to identify their behaviour as 'evasion', this category of non-domiciled individuals is even less likely to self-identify as 'tax evaders.' A large portion of this population would also not have access to professional advice – either because they cannot afford it, or because they have no other reason to habitually seek professional advice, or both. While they should be encouraged to correct their tax affairs, they are at risk of being disproportionately affected by the rules, both in terms of the financial and administrative burden of disclosure, and in terms of the relative financial impact of any penalties.

Wider communication

Bearing in mind that the majority of non-compliant taxpayers do not identify with 'evasion', it is important for any new regulatory measures to be accompanied by wider awareness-raising communication.

Agents, tax advisers and the accountancy profession can play a crucial role in facilitating targeted communication, by making their clients aware of the RTC rules and their implications. Similarly, financial institutions, including high street banks, should be encouraged to spread the message as part of fulfilling their CRS responsibilities.

However, others, such as the lower-income non-domicile population, need to be reached by other communication channels. These could include foreign embassies and citizens' advice bureaus, as well as general communication channels such as print, online and social media. It is of paramount importance that the government ensures that the message reaches all potentially non-compliant populations, including lower-income populations, as soon as possible, so that taxpayers have sufficient time correct their tax affairs.

[3] As set out in paragraph 4.7 of the consultation document

+44 (0)20 7059 5000
info@accaglobal.com
www.accaglobal.com
The Adelphi 1/11 John Adam Street London WC2N 6AU United Kingdom

Facilitating correction

Before proceeding to FTC penalties, it is essential that resources and guidance are made available to taxpayers to facilitate correction. In our view, the existing digital portals and the Contractual Disclosure Facility are, in their current state, unsuitable for this purpose.

We would encourage the government to consider improving the efficiency of disclosure facilities, by:

1. publishing specific minimum disclosure requirements
2. using simple, neutral, non-accusatory language
3. clearly sign-posting taxpayers to communication channels, including both digital and postal options
4. providing firm assurances regarding data protection and privacy, and explaining how the information provided will be used.

An easy-to-navigate disclosure facility is particularly important to those non-compliant taxpayers who do not have ready recourse to professional advice.

Data matching processes

The use of data from taxpayers, including disclosure from non-compliant taxpayers, must be subject to clearly defined and regulated protocols.

If information powers are to be extended or changed to respond to the need to verify RTC disclosures, it is paramount that the specific data requirements, and the purpose of obtaining such data, are clearly and explicitly defined. Data protection and privacy must not be compromised, especially where HMRC relies upon private sector organisations to obtain, collate and provide information to HMRC.

+44 (0)20 7059 5000
info@accaglobal.com
www.accaglobal.com
The Adelphi 1/11 John Adam Street London WC2N 6AU United Kingdom

SPECIFIC ISSUES

Q1: Are there any key circumstances missing from the proposed scope and definition or do you foresee any difficulties with applying this definition?

ACCA fully supports HMRC's efforts to ensure that the correct tax is paid on as many transactions and events as possible worldwide, and to that end a broad scope for the RTC is appropriate. However, the ancillary responses to identifying an underpayment should also be appropriate for the taxpayer's situation. We would urge the government to bear in mind when drafting legislation that there is a large proportion of taxpayers, such as the non-domicile workers mentioned above, whose non-compliance does not arise from an intention to evade UK tax. We believe that any regulation to combat tax evasion should clearly distinguish between those who act with the intention to evade tax, and those who have unintentionally failed to comply.

Q2: What are your views on limiting the scope of the RTC to those taxes currently covered by offshore penalties?

Q3: What, if any, other taxes should we look to include within scope?

In all practically likely circumstances where there is an offshore liability under another head of tax there will also be a liability to one of the taxes currently within scope. It is possible that a defaulting taxpayer's affairs in relation to currently in scope taxes will be unsusceptible to revision, but appears unlikely. The difficulties of express extension of the regime compared to the risk of any unfairness arising from failure to extend tend to suggest that the scope should be limited to those taxes currently covered by offshore penalties. We would though urge HMRC to adopt a pragmatic and sympathetic approach to enabling taxpayers who wish to correct to bring themselves within the regime, especially where the historic failures have been unintentional.

Q4: Do you foresee any issues with a window to correct covering the period April 2017 to September 2018? Should we consider any other dates for the window?

Subject to HMRC devoting sufficient resource to ensuring public awareness of the facility the 18 month period should be adequate, and the end date in particular aligns appropriately to other elements of the compliance framework.

+44 (0)20 7059 5000
info@accaglobal.com
www.accaglobal.com
The Adelphi 1/11 John Adam Street London WC2N 6AU United Kingdom

Q6: Do respondents have any concerns about this approach to correcting?

For wealthy taxpayers who can afford professional advice the proposed options would offer the potential to benefit from similar levels of HMRC service as were experienced under the LDF, especially where the advisers engaged also have experience fo that route to disclosure. However, for those who do not have access to experienced advisers, the routes identified in paragraphs 4.19 are not sufficiently specific. The form and structure of the disclosures required are not sufficiently clear. In order to encourage correction, it is crucial that the methods for correcting are as specifically identified, clearly explained, and sources of guidance and external professional advice signposted.

As noted in our overall comments above, there is a potentially large population of taxpayers who have unintentionally failed to correct their tax affairs. This may include medium- to low-income individuals who are unused to dealing with tax authorities, and who may not have recourse to professional tax or legal advice. If such individuals are to be within scope of the proposed measures, HMRC must provide clear, neutral guidance that refer them to sources of professional advice – including pro bono advice. This is important in order to ensure the measures do not penalise them to a disproportionate extent.

Paragraph 4.20 refers to a number of disclosure methods. We have specific concerns relating to each method, as explained below:

1. Digital disclosure portal: Gov.uk (https://www.gov.uk/government/publications/hm-revenue-and-customs-disclosure-service) signposts the targeted taxpayer to the Worldwide Disclosure Facility (https://www.gov.uk/guidance/worldwide-disclosure-facility-make-a-disclosure). However, the length of the guidance, and the early mention of prosecution and criminal investigation (contrary to the recommendation of the HMRC research report referenced in paragraph 3.5 of the consultation document) is more likely to deter than encourage taxpayers from making disclosure.
   Specifically, the Worldwide Disclosure Facility allows taxpayers 90 days to make full disclosure after receiving their Disclosure Reference Number. As the consultation document itself acknowledges (in paragraph 4.16), taxpayers need time to review and assess their affairs. Allowing for an 18 month window to correct, when the disclosure portal only allows 90 days for taxpayers to familiarise themselves with the information requirements and make full disclosure, creates the potential

+44 (0)20 7059 5000
info@accaglobal.com
www.accaglobal.com
The Adelphi 1/11 John Adam Street London WC2N 6AU United Kingdom

for confusion, and the implications for timescale of entering the portal must be made clear.
Finally, the Worldwide Disclosure Facility allows for disclosure tax years up to and including 2014 to 2015 only – this would rule out the correction of potential tax lost due to carelessness and deliberate behaviour (in line with the assessment periods stated in paragraph 4.21 of the consultation document).

2. Contractual Disclosure Facility (CDF): Based on the HMRC's research report finding that most non-compliant taxpayers do not identify with 'evasion,' the CDF is ill-equipped to encourage disclosure, linked, as it currently is, to 'admitting tax fraud.' If targeted taxpayers do not identify with 'evasion', they are even less likely to identify with 'tax fraud.'
3. Direct discussion with HMRC through an existing Customer Relationship Manager: Given existing HMRC resources, we do not believe that direct discussion with taxpayers on an ad hoc basis is a practicable and reliable method of disclosure for a significant proportion of those who may have irregularities in their offshore affairs.

Q7: Are there any other approaches to correction we could consider?

We would recommend the Government to consider the following features in defining a suitable method for correction:

1. Specific minimum disclosure requirements that are made public (for example, on the Gov.UK website)
2. Simple, neutral, non-accusatory language
3. Clearly identified and sign-posted communication channels, including both digital and postal options
4. Firm assurances regarding data protection and privacy

We would recommend the Government to review the Australian Tax Office's webpage for voluntary disclosure, as an example of how communication and disclosure portals may facilitate optimal cooperation from taxpayers: https://www.ato.gov.au/General/correct-a-mistake-or-amend-a-return/make-a-voluntary-disclosure/how-to-make-a-voluntary-disclosure/

Q8: What are your views on using the standard assessment periods to define the contents of the RTC?

While there is a commendable logic to following existing practice and legislation, there is a concern that the distinction between "despite reasonable

+44 (0)20 7059 5000
info@accaglobal.com
www.accaglobal.com
The Adelphi 1/11 John Adam Street London WC2N 6AU United Kingdom

care" and "carelessness" may mean different things to an HMRC officer than it would to an unrepresented taxpayer. Likewise, the borderline between carelessness and deliberate behaviour may be blurred (although the risk of an unfair outcome is perhaps reduced given the greater likelihood of taxpayers whose affairs merit the devotion of such resource by HMRC having professional representation to ensure that the correct definitions are employed).

Q9: What are your views on handling the issue of taxpayers delaying to allow years to pass out of assessment time limits in this way? Are there any other approaches you believe we should consider?

The proposals should not in any way disadvantage a taxpayer who has simply been caught out by the complexities of cross border living and will take advantage of the facility if HMRC are able to make them aware of it.

Q10: What are your views on a proposal to extend the assessment period for tax and penalties to ensure years do not drop out of assessment as the CRS data arrives? Could we address this issue in any other way?

If tax were truly the priority for HMRC that government appears to believe it to be for taxpayers then allocation of sufficient resource to review the data in a shorter timeframe would remove the need for adjusting time limits.

Creating a one off extension of time limits in respect of only certain classes of tax or tax information would unnecessarily complicate the legislative framework for advisers and taxpayers. Requesting a rule change to allow itself more time in one area of tax while imposing ambitious implementation timetables on taxpayers themselves in every other main area of tax will run the risk of damaging any goodwill that taxpayers may have for HMRC.

If any extension is justified, then a far shorter period would be appropriate. HMRC would then have an incentive to properly concentrate its resource on those taxpayers with the most significant potential outstanding liabilities. A period of 12, or at most 24, months should be adequate for HMRC to undertake an initial filter of CRS data and identify those cases which merit further investigation. A five year extension would more than double the window for unintentionally non-compliant taxpayers. If HMRC's publicity campaigns around offshore tax affairs are properly effective then there will be no future loss for such taxpayers in any event.

+44 (0)20 7059 5000
info@accaglobal.com
www.accaglobal.com
The Adelphi 1/11 John Adam Street London WC2N 6AU United Kingdom

Q11: What are your views on the proposed contents of a correction? Do you foresee any issues or further information we should seek?

For unrepresented foreign taxpayers with modest affairs and limited knowledge of the English language the proposal that they declare details of all interest and penalties with their disclosure is unrealistic. It is reasonable that HMRC should expect taxpayers to set out details of their behaviour (and any third parties directly involved in facilitating the non-compliance), and where possible to attempt an assessment of the penalties and interest due.

However, a failure to correctly identify and interpret the relevant legislation should not disqualify an unintentionally non-compliant taxpayer from benefiting from the facility. A disclosure should not be rendered automatically incomplete or inadequate by reason of the absence or incorrect nature of any attempted calculation of interest and assessment of penalties, although in considering whether to agree the taxpayer's estimate or impose their own figures HMRC should have regard to all the circumstances of the case, and in particular any imbalance of resources between the Department and the taxpayer.

Q12: We would be interested in views on whether HMRC should consider further information powers to support the RTC or more widely the CRS?

In evaluating any potential extension or changes to existing information powers to support discovery assessments relating to corrections made under the RTC or the use of the CRS data, we would encourage the Government to consider the Australian government's data matching programme for tax administration. Under the Australian model, each data matching programme adheres to privacy laws and the government's privacy guidelines. They are regulated by a set of specific protocols, identifying the purpose of the data matching programme, the data that is to be collected, the sources of the data and how the data is to be used.

In our opinion, if information powers are to be extended or changed, it is of paramount importance that the specific data requirements, and the purpose of obtaining such data, are clearly and explicitly defined. We also believe that data protection and privacy must not be compromised, especially where HMRC relies upon private sector organisations to obtain, collate and provide information to HMRC.

+44 (0)20 7059 5000
info@accaglobal.com
www.accaglobal.com
The Adelphi 1/11 John Adam Street London WC2N 6AU United Kingdom

Any changes made to the powers regime in respect of the time limited disclosure facility should themselves incorporate a specific sunset clause.

Q13: Do respondent have any alternative ways of handling the issue of ongoing enquiries? Are there alternatives to extending the window in these circumstances?

The third is the preferred option. We would however expect HMRC to exercise appropriate operational discretion where through no fault of their own a taxpayer is unable to comply strictly with the RTC information deadline. Such discretion would of course be dependent upon factors such as the nature of the difficulties encountered and the taxpayer's conduct throughout the enquiry.

Q14: Are there other complex situations we need to give special consideration to?

Q15: What do you think should be included within the scope of reasonable excuse for not having met the obligations of the RTC? What do you think should not be included as a reasonable excuse?

Though captured in statute, the concept of "reasonable excuse" depends upon the concepts and flexibility of the common law. What will be reasonable will in every case depend not just upon the detailed facts in isolation but also upon the wider context of the situation.

ACCA is in particular concerned that HMRC may have underestimated the level of disengagement of many who will technically be caught by the new FTC offence, and the difficulties of communicating effectively to them within the timeframe envisaged the importance and extent of their obligations under UK tax law. Where an individual's grasp of English is insufficient to understand any relevant material put out by HMRC, a failure to provide and properly publicise translations in a language in which the taxpayer has the necessary competence should constitute a reasonable excuse. Where an unrepresented individual is outside the UK for the period of publicity, but returns later and HMRC identify them through a subsequent sweep of CRS data, that lack of exposure to the campaigns should constitute a reasonable excuse.

If HMRC go ahead with the proposal to punish those found guilty of FTC at the most severe levels, regardless of whether the dishonest intent historically fundamental to the offence of evasion was present, then the availability of

+44 (0)20 7059 5000
info@accaglobal.com
www.accaglobal.com
The Adelphi 1/11 John Adam Street London WC2N 6AU United Kingdom

reasonable excuse must be as wide as possible in order to avoid unfair outcomes which provide no net benefit to society.

Q16: What are your views on the two penalty models proposed? We would welcome other ideas on a penalties model for FTC.

We would favour Model 2, as it allows for a more nuanced approach that encourages unprompted disclosure.

Q17: What are your views on extending the civil enablers penalties to cover the RTC?

Further extension of the civil enablers penalties before they have properly bedded in would add to the complexity and uncertainties of the UK tax regime. While an extension may be appropriate in the future, any penalties in relation to circumvention of the RTC will be in connection with FTC. Accordingly there will be time to review and consider the operation of the RTC before creating further regulation in respect of an issue which may not in fact arise.

+44 (0)20 7059 5000
info@accaglobal.com
www.accaglobal.com
The Adelphi 1/11 John Adam Street London WC2N 6AU United Kingdom

TECH-CDR-1418

ACCA


+44 (0)20 7059 5000

info@accaglobal.com


www.accaglobal.com


The Adelphi 1/11 John Adam Street London WC2N 6AU United Kingdom