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HMRC letters to non-resident companies which hold or held an interest in UK property

An update for members of the Chartered Institute of Taxation (CIOT)

This update provides information about the letters together with some guidance to help CIOT members decide the most appropriate way to respond if a client receives one of the letters from HMRC.

Depending on the circumstances, HMRC may issue one of two letters. The letters will be accompanied by a Certificate of Tax Position and a Notice of Intention to Disclose.

Pdf copies of the standard wording for these letters, the notice of intention to disclose and the certificate are available alongside this update.

We understand that HMRC's aim in sending these letters is to prompt recipients of the letters to review their affairs and encourage those who need to rectify mistakes to make voluntary disclosures to HMRC.

One letter is headed "Disclosure for Annual Tax on Enveloped Dwellings/Non-Resident Landlord liabilities". It will be issued to non-resident companies that own UK property and may need to disclose income received as a non-resident corporate landlord or a liability to the Annual Tax on Enveloped Dwellings (ATED). Under the Transfer of Assets Abroad (ToAA) legislation, if a UK-resident individual has made or procured a transfer of assets and, as a result, income has become payable to a non-resident landlord, the individual may be within the ToAA income charge provisions at s721 ITA 2007 (if they have power to enjoy the income e.g. by being a beneficiary of a trust that owns the property-holding company) or s727 ITA 2007 (if they receive, or are entitled to receive, a capital sum connected with the transfer e.g. where they have made a loan to the person abroad, entitlement to repayment of that loan). A UK resident who has not personally transferred assets but benefits from a transfer made by somebody else (e.g. occupation of property) may be within the ToAA benefits charge at s731 ITA 2007.

The other letter is headed "Disposal of Interest in UK residential property". It will be issued to non-resident companies that appear to have made a disposal of UK residential property between 6 April 2015 and 5 April 2019 without filing a Non-Resident Capital Gains Tax (NRCGT) return. Between 6 April 2015 and 5 April 2019, disposals of UK residential property by non-resident companies were subject to NRCGT. Where the company purchased the property before April 2015 and the whole of any overall gain is not charged to NRCGT (or otherwise), then that part of any gain not charged may be attributable to the participators in the company under s13 TCGA 1992 (these rules have since been relocated to s3 TCGA 1992). If the company is part of a wider structure (e.g. an offshore trust structure or corporate group) then consideration should be given to checking whether any part of that structure (or individuals such as settlors or beneficiaries) also need to tell HMRC about tax which has not been correctly declared. Additionally, such corporates may also be liable to pay UK tax on rental profits, income tax under the transactions in land rules and/or ATED.

What's in the letters?

Key points to be aware of regarding the letters are:

- The letter headed "Disclosure for Annual Tax on Enveloped Dwellings/Non-Resident Landlord liabilities" states that HMRC's records show that the company owns UK property, and that the company may need to disclose a liability to ATED and / or rental income.

- The letter headed "Disposal of Interest in UK Property" states that HMRC's records show that the company disposed of an interest in a UK property on a certain date, and that the company may need to make a disclosure about the disposal.

- These statements indicate that the letters are not speculative; HMRC are taking a risk-based approach and only contacting taxpayers where their records indicate that a disposal has taken place and has not been reported to HMRC in a return, or that the company owns a UK property and has not filed a ATED return and / or registered to pay Income Tax (pre 6 April 2020) or Corporation Tax (from 6 April 2020) on rental income. (Members should bear in mind that HMRC has extensive access to data, including Land Registry data which they use to identify entities to contact.)

- If the company should have filed a NRCGT / ATED return and / or registered for Income Tax and / or Corporation Tax then it must make a disclosure. The letters say this must be done by completing and sending the enclosed Notice of Intention and Certificate of Tax Position to one of two dedicated email addresses:

    - offshorecompaniesnrcgtnf@hmrc.gov.uk

      (For disclosures in response to the letter headed "Disposal of Interest in UK Property").

    - offshorecompaniesnrlatednf@hmrc.gov.uk

      (For disclosures in response to the letter headed "Disclosure for Annual Tax on Enveloped Dwellings/Non-Resident Landlord liabilities".

  or by post to the address at the top of the letter – Indv and Small Business Compliance, HMRC, BX9 1LE - using the reference provided in the letter.

  The Worldwide Disclosure Facility (WDF) via the Digital Disclosure Service must not be used.

- If no disclosure is required, HMRC ask that the certificate is completed and returned explaining why, using the reference provided.

- The letters recommend getting professional tax advice since this is a complex area of tax.

- HMRC give 40 days from the date of each letter to respond. If there is no response within 40 days, they may assess the tax they believe the company owes.

- They warn recipients that by sending the letter HMRC are giving the company the opportunity to tell them about the company's tax position and that if HMRC later find out that the company

did not tell HMRC everything, HMRC will view this very seriously and could carry out an investigation which could result in them charging (additional) penalties.

- There is a standard paragraph about charging interest on late payment of tax and that paying any tax owed will reduce the amount of interest chargeable.

- There is a paragraph providing information about how to make a disclosure if the recipient has committed tax fraud and wants to tell HMRC.

- The letters are not copied to the company's tax agent. This is because HMRC have no way of knowing if the company has an agent as they are non-filers. The letters say that if the company is using an agent, it should check they have the company's written approval and share that with HMRC. There are paragraphs providing information about how to authorise an agent.

- There is important information about what happens next once the notice of intention to disclose has been submitted to HMRC. The letter says that the disclosure will be processed manually and not by the WDF. However, the same information will need to be provided as would be the case if using the WDF and the steps to follow are the same. The letters explain how to find guidance about the WDF on GOV.UK.

- The letter invites recipients whose health or personal circumstances make it difficult for them to deal with the matter, to tell HMRC so HMRC can help them in the most appropriate way. The letter explains how to search GOV.UK for further information about how HMRC help people with additional needs.

- Various compliance factsheets are included as attachments to the letters:

    - The Human Rights Act and penalties - Compliance checks series – CC/FS9
    - Penalties for failure to notify - Compliance checks series – CC/FS11
    - Penalties for offshore non-compliance – Compliance checks series – CC/FS17
    - Penalties for failure to file annual and occasional returns and documents on time (including Self Assessment tax returns for Income Tax) - CC/FS18a

- All the letters include a form to complete if the recipient intends to make a disclosure. This asks for some basic information about the disclosure, about the person making the disclosure and the name and address of the company.

- All the letters include a "certificate of tax position" form which HMRC ask the company to complete and return within 40 days of the date of the letter whether they have additional tax liabilities to disclose or not.

- The certificate asks the company to choose which statement from three statements is accurate for its circumstances, tick the relevant box and complete the further information requested.

On the certificate,

- If the company needs to make a disclosure to bring its tax affairs up to date the certificate only provides the option of confirming that this will be done using the disclosure facility detailed in the letter. It also compels the company to tell HMRC how the error occurred as well as confirming that the error will not be repeated.

- The company is given other options too – to explain why it did not declare all its income/gains/ATED liability or to confirm that it believes its tax is correctly declared.

- The company's representative is asked to sign and make a declaration to the effect that:

  a) The information they provide on the certificate will be "correct and complete to the best of their knowledge and belief"; and

  b) They understand that dishonestly making a false statement to evade paying tax is a criminal offence and that they may be subject to investigation and prosecution.

What you should do if a client receives one of these letters from HMRC

1. Check the position

The letters suggest that HMRC believe the corporate has not returned all its income and gains correctly in the UK. It also references potential liabilities for UK resident individuals and participators. Before responding to one of these letters it is essential to check the position with your client to establish if a disclosure needs to be made or not and, if so, which taxpayer needs to make the disclosure.

If the corporate is part of a wider structure (e.g. an offshore trust structure or corporate group) then consideration should be given to checking whether any part of that structure (or individuals such as settlors or beneficiaries) also need to tell HMRC about tax which has not been correctly declared.

2. Respond to HMRC's letter, whether or not there is anything to disclose

a. If a disclosure needs to be made, use the disclosure facility detailed in the letter or another appropriate method (such as the Contractual Disclosure Facility (CDF))

If a disclosure is required, the letter advises that this must be made using the disclosure facility explained in the letter. The WDF must not be used.

However, HMRC cannot compel a taxpayer to use any specific method for their disclosure and using the disclosure facility detailed in the letter may not necessarily be the most appropriate method. Depending on the circumstances, other approaches may be better e.g. Code of Practice 9 (CDF). This is mentioned too in the letter.

Agents should therefore consider their client's specific circumstances as well as the legal position. The certificate and letter refer to criminal offences and prosecution. After taking the person's circumstances and the legal position into account, agents should advise clients on the most appropriate method for a disclosure.

A CIOT member must comply with the fundamental principle of professional competence and due care as set out in Professional Conduct in Relation to Taxation (PCRT). This means that they should not undertake professional work which they are not competent to perform unless they obtain appropriate assistance from a suitably qualified specialist. Advice from another adviser specialising in tax disputes may therefore be needed if the agent does not have the necessary expertise to advise on a suitable disclosure route and handle a disclosure themselves under either the facility provided or the CDF.

It should also be noted that since HMRC are writing to companies advising them that they think they need to make a disclosure and will take further action if they do not make a disclosure, that HMRC's view is that any subsequent disclosure will be treated as 'prompted' which will have implications in terms of the level of penalties that might be charged, for example under Sch 24 FA 2007, Sch 41 FA 2008 and Sch 18 F(No.2)A 2017. If a disclosure of deliberate mistakes is prompted, then that may also affect whether the taxpayer's details may be published under s94 FA 2009.

b. If no disclosure is needed, consider sending HMRC an explanation by letter.

HMRC will accept a response by letter instead of a person completing the "certificate of tax position" (see 3. below).

Where no response to their letter is received, HMRC will follow up so not responding at all will attract more attention from HMRC. Follow up may involve HMRC formally assessing the additional tax they consider is due. Alternatively, HMRC may open an investigation.

Responding to the initial letter may therefore mitigate the risks of further action being taken by HMRC. However, HMRC can make no guarantee that responding to the letter will avoid a compliance check or investigation. HMRC may, after considering the response, need to ask follow-up questions to clarify points, for example.

If possible, try to respond within the 40 days provided by HMRC. However, if it is not possible or practical to respond fully to the letter within this timescale consider contacting HMRC either by telephone, email, or letter to agree a more realistic timescale with them.

3. In view of the serious consequences of making a false declaration, consider very carefully whether your client should sign and return the "certificate of tax position".

When advising a client who has received one of these letters, it will clearly be important that the consequences of completing and signing the certificate are made clear to them.

Although the declarations in the "certificate of tax position" are similar, if not completely identical, to those on the NRCGT, ATED, Income Tax and Corporation Tax returns, there are two important differences.

1. There is no legal obligation on the company's director or representative to complete the "certificate of tax position" and return it to HMRC; and

2. The period covered by the "certificate of tax position" - and therefore the declarations - is not restricted to a particular tax year. It applies to all tax years.

The certificate does not have a de-minimis level and is not limited to a particular period in time.

In addition, the certificate asks how the error occurred. Information about how the error occurred will typically take some time to obtain and will normally be provided to HMRC during the disclosure process. It would therefore be more appropriate and practical to provide this information during the disclosure process rather than on the certificate.

The certificate also asks for confirmation that the error will not be repeated. It is not clear why HMRC are asking the company to confirm this if it has disposed of a UK residential property. Confirming that the mistake will not happen again may not necessarily be relevant e.g. if the company owns no other properties of this type.

There is little space on the certificate to include much information or explanation. A response by letter is preferable as that enables an explanation to be included which could pre-empt further queries by HMRC.

In discussions between the CIOT and HMRC, HMRC have agreed that:

- there is no legal obligation for the company to complete and return the certificate to them,

- it is likely to be preferable to respond by letter particularly where clients have complex tax affairs or need to tick more than one of the certificate's boxes, as this will enable more information / explanations to be provided to HMRC about their tax position.

- they will accept a response by letter as an alternative should the company choose not to complete the declaration.

In view of the serious consequences of making a false declaration (including by ticking the wrong box), it is likely to be preferable to respond by letter to HMRC and not complete the certificate of tax position. It is also likely to be preferable to respond by letter and not complete the certificate of tax position, if, after reviewing their tax affairs, the company believes that its affairs are correct and up to date and it does not need to make a disclosure (given the serious consequences of making a false declaration).

4. Be clear on who your client is and avoid conflicts of interest

If mistakes were made by different taxpayers (e.g. the corporate and some of its UK resident participators or the corporate plus the trust which owns it and some of the trust's beneficiaries) it is important to ensure that you are clear on who your client is. This will affect to whom you address your engagement letter(s). You should ensure that you are clear that no conflicts of interest arise if you act for more than one taxpayer. However, it can be in the best

interests of all parties for there to be one adviser who can look at the issues holistically and approach HMRC to resolve them collectively.

HMRC is empowered to consider whether anyone enabled offshore non-compliance (Sch 20 FA 2016) or tax avoidance (Sch 16 F(No.2)A 2017) and, if so, penalise and name them. The structure's advisers/agents and/or professionals (such as professional trustees) may be concerned about this. If a person or firm concerned about being sanctioned under the enablers rules seeks advice from the member who is handling the taxpayer(s) disclosure, then the member should encourage the person/firm to obtain independent advice from another suitably qualified professional (e.g. a specialist solicitor).

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