Requirement to Correct Offshore Tax Non-Compliance

Practical Notes for CIOT and ATT members

We have produced these practical notes for members following recent discussions the CIOT has had with HMRC regarding the scope and operation of the Requirement to Correct (RTC).

You should also refer to HMRC's guidance which was first published on 16 November 2017 and subsequently updated on 11 July 2018 and 21 August 2018. The guidance can be found at https://www.gov.uk/guidance/requirement-to-correct-tax-due-on-offshore-assets.

The CIOT has already published Q&As which we produced from the questions that were raised by members before and during our webinar which took place on 18 July 2018, see https://www.tax.org.uk/sites/default/files/180718%20QAs%20from%20RTC%20Webinar.pdf. We recommend that you read these Q&As in conjunction with watching the webinar which was recorded and can be viewed at the following link for 12 months - http://lexisauditorium.com/stage.aspx?c=5123dba9-0f52-4759-bf1d-fbf62ea9037b.

References to "paras" in this note are to paragraphs in Schedule 18 Finance (No 2) Act 2017.

Disclaimer

No responsibility can be accepted by the CIOT or ATT for the consequences of any action taken or refrained from as a result of these practical notes which are based on the CIOT and ATT's understanding of the legislation and how HMRC will apply the legislation at the time of writing [August 2018]. We recommend that if you are in any doubt about whether your client should make a disclosure under the RTC or not by 30 September 2018 that you seek independent specialist professional advice and /or contact HMRC at consult.nosafehavens@hmrc.gsi.gov.uk.

1. What has to be corrected?

(a) Income Tax and Capital Gains Tax (CGT)

- The RTC only applies if HMRC can raise an assessment to recover the unpaid tax on 6 April 2017 (para 6 Schedule 18 Finance (No 2) Act 2017)
- 2016–17 is not covered as non-compliance did not exist on 5 April 2017 (para 3(1)(a) and para 8)
- See HMRC's RTC guidance under section 8 "Time limits governing whether HMRC can make an assessment to recover tax on 6 April 2017" for

information about assessment time limits plus links to HMRC's Compliance Handbook, for example:

If a return has been filed, HMRC can assess the following years on 6 April 2017:

i) 2013–14 to 2015–16 regardless of the reason for the error
ii) Plus 2011–12 and 2012–13 if the error was careless or deliberate
iii) Plus 1997–98 to 2010–11 if the error was deliberate

- We recommend that you check the time limits in every case to satisfy yourself which years are in scope
- Anything assessable on 6 April 2017 remains assessable for a further 4 years so HMRC have until 5 April 2021 to raise assessments (para 26), although for later years this deadline will be extended if the draft legislation for the new Finance Bill is enacted extending assessment time limits to 12 years in some cases. This could include situations where HMRC issued notices to file but the returns were not submitted by 5 April 2017

(b) Inheritance Tax

- As well as charges on death, lifetime charges are also included (e.g. entry charges, 10-year charges, failed PETs)
- See HMRC's RTC guidance under section 8 "Time limits governing whether HMRC can make an assessment to recover tax on 6 April 2017" for information about assessment time limits plus links to HMRC's Compliance Handbook, for example:
    - Relevant property charges between 16 November 1997 and 5 April 2017 if no return was filed
    - Entry charges between 16 November 1997 and 15 November 2016 if no return was filed
    - Deaths occurring between 16 November 1997 and 15 November 2016 if no return was filed or the property in question was omitted from the return
    - Occasions of charge earlier than 16 November 1997 if the failure to file was deliberate
- We recommend that you check the time limits in every case to satisfy yourself which years are in scope

(c) Employment income

- Tax payable by the employee (e.g. on benefits in kind) is within RTC
- PAYE is included if the employer no longer exists e.g. because it is liquidated
- Otherwise PAYE is not within RTC
- NICs are not within RTC

(d) Companies

- Corporation tax is not one of the taxes to which RTC applies so companies are not within RTC unless they are liable to income tax and/or CGT
- Companies normally pay Corporation Tax instead of income tax and CGT. However, there are circumstances in which a company might be liable to income tax or CGT such as if the income or chargeable gain accrues to the company in a fiduciary or representative capacity' (see s3 CTA 2009)

2. Advice that can be relied upon and advice which is "disqualified" and can't therefore be relied upon

(a) "Disqualified advice"

- Advice which is disqualified cannot be relied upon and is automatically taken not to be a reasonable excuse (para 23(2)(d))

(b) Giver of advice – "interested person" and "avoidance arrangements"

- Advice given by an "interested person" is "disqualified advice" (para 23(3)(a))
- Advice given as a result of arrangements made between an "interested person" and the person who gave the advice is also disqualified (para 23(3)(b)
- "Interested person" is someone who participated in relevant avoidance arrangements or facilitated the taxpayer's entry into them (para 23(5))
- Avoidance arrangements are widely defined (para 23 (6))
- Arrangements are not avoidance if in accord with established practice accepted by HMRC (para 23(7))

(c) Giver of advice – "appropriate expertise"

- Advice will be disqualified if the person who gave the advice did not have appropriate expertise for giving the advice (para 23(3)(c))
- HMRC's guidance states in section 18 ("The appropriate level of expertise for advisers") that any member of CIOT or other UK recognised legal, accountancy or tax advisory body is accepted by HMRC as having the "appropriate expertise" to give advice on UK tax matters
- However, if it questionable whether the member genuinely has the appropriate expertise on the area of tax concerned or if the client knows he lacks the expertise, HMRC's guidance may not offer protection

(d) Receiver of advice

- Advice addressed to or given to someone other than the taxpayer is disqualified (para 23(3)(e))
- Trustees cannot therefore rely on advice given to the settlor or beneficiaries

(e) Information the adviser must have

- Advice that does not take account of all the taxpayer's individual circumstances (save insofar as not relevant to the advice) is disqualified (para 23(3)(d))
- Even one unknown or ignored fact therefore may disqualify the advice or otherwise mean that the taxpayer will not be deemed to have a reasonable excuse for failing to correct (unless the taxpayer provided all the information/documentation that the adviser requested and did not know that the other piece of information was needed/relevant)
- HMRC consider that a change in law or practice since the advice was given is a relevant circumstance and thus invalidates the advice or the reasonable excuse

(f) Disqualified advice and reasonable excuse (para 23)

- The legislation is clear that a second opinion is disqualified if there are arrangements between the firm which gave the original disqualified advice and the person providing the second opinion (para 23(3)). Arrangements are widely defined
- The firm and the person at the firm who gave the advice must both be considered for the purposes of the disqualified advice test
- The adviser is only disqualified as respects the advice they gave on the tax avoidance. But their advice can be relied on in relation to other matters, e.g. whether the taxpayer's behaviour was deliberate or careless, e.g. if the adviser helps the person disclose and that disclosure is on the basis that 4 years' tax was due (reasonable care) then this is not disqualified advice if it later turns out that the person was careless, so 6 years' tax is due
- Also see the HMRC guidance (see the paragraphs below example 10A – the paragraph starts "HMRC accepts that…")

(g) HMRC's Guidance

- You should also refer to HMRC's guidance and examples – see sections 16 ("Relying on professional advice") to 19 ("Advice needs to take account of all the taxpayer's relevant circumstances")

3. Practical steps

(a) Advice

- Historic advice may be difficult to rely on as a reasonable excuse because
  (1) Risk facts may come to light which are relevant circumstances of which account was not taken
  (2) Uncertainty over whether what the advice related to does or does not fall within the definition of avoidance
  (3) Law may have changed as a result of subsequent decided cases

- Fresh advice is difficult to rely on in any case where there is a risk that facts could come to light later of which account should have been taken
- This means that nil liability disclosures will normally need to be used as a route to providing certainty for taxpayers
- Example 9 in the updated RTC guidance is correct only if the taxpayer gave the adviser all correct and complete relevant information to use when providing the advice on his domicile status. If this did not happen then there is no reasonable excuse

(b) Nil liability disclosure

- Procedure is outlined in section 22 of HMRC's guidance and is concessionary so **must** be followed (see under headings "Professional advice which leaves you uncertain about making a disclosure" and "Information you must supply when making a disclosure that no tax is due")
- Can be used to gain certainty by supplying "relevant information" to HMRC
- This process is a concession provided in the guidance that allows taxpayers, in limited circumstances, to provide less information than might strictly be required by the legislation and is designed to facilitate nil liability disclosures
- HMRC will look at all nil disclosures and may query/investigate them
- HMRC will not seek a FTC penalty if all relevant facts are disclosed as in effect the taxpayer will be treated as having made a correction
- This route is only for taxpayers **not under enquiry** and should not be used where the taxpayer is under enquiry. Here the case officer should be contacted with a view to agreeing what should be supplied before 30 September
- The procedure outlined under section 20 of HMRC's guidance (starting "If by midnight on 30 September 2018 …..") must be followed to ensure the taxpayer will not be liable to a penalty for failing to correct by 30 September 2018

(c) Disclosures where more tax is due

- During the RTC period corrections can be made in the methods set out para 13. HMRC's guidance under the heading "Ways of making a correction under the RTC rule" is meant to clarify the points in the legislation and adjust the obligations/deadlines depending on which route is used i.e. WDF v COP9 etc. The "RTC period" is the period from 6 April 2017 to 30 September 2018 (para 1(b))
- The guidance says that corrections can be made via the WDF or any other service provided by HMRC as a means of correcting tax non-compliance, telling an officer in the course of an enquiry or any other method agreed with HMRC. The use of the phrase "enquiry or intervention" in this part of the guidance includes COP8 investigations

- Where there are already open enquiries/COP8s, HMRC want taxpayers to notify HMRC if they need to make a RTC correction during the RTC period and provide an outline disclosure by 29 November 2018. The COP8/enquiries' outline disclosure's requirements intentionally mirror the headings on a COP9 outline disclosure form. The guidance for corrections where there are open enquiries/COP8 specifies the information that must be included in the outline disclosure in order to satisfy the RTC and protect against FTC penalties. This includes a summary of the records available to help make the disclosure and "the amounts of tax that you believe you owe"

(d) Open enquiries where the taxpayer believes no more tax is due

- This may occur for example where HMRC is enquiring into a person's use of a tax avoidance arrangement or their residence/domicile status and the person believes that they are correct and no more tax is due
- HMRC are encouraging all caseworkers to contact all taxpayers with open enquiries about the RTC. HMRC will be issuing letters re: income tax, CGT and IHT to draw their attention to RTC. Some (e.g. domicile enquiries) have already been sent
- If, after receiving one of these letters, the taxpayer decides that they will concede so more tax is due then the legislation and guidance for making a correction must be followed
- Where the taxpayer decides to maintain their position then they may face FTC penalties/publishing unless they provide all the information requested in the letter by the appropriate deadline. They cannot use the protective nil disclosure route outlined above
- Sometimes there will be disagreement over what the "relevant information" is that needs to be provided or HMRC's letter asks the taxpayer to provide "relevant information that is not listed above". If the taxpayer does not think something is relevant then they do not need to provide it but HMRC's position is that if they do that they will not have the certainty they might otherwise have. If in doubt, discuss the situation with the HMRC officer who issued the letter and agree what needs to be provided

(e) Estimates

- If an estimated liability is provided in the absence of accurate information (e.g. because the taxpayer could not obtain the information or because another figure was used rather than getting a professional asset valuation) then this should be explained. The figure provided should be correct to the best of the taxpayer's knowledge and belief
- If the eventual tax liabilities are materially higher, then HMRC may revisit FTC penalties as this might indicate the taxpayer was not compliant with RTC. HMRC recommend erring on the side of caution when stating the amounts of tax owed

(f) Multiple parties

- In the case of a single report being prepared for multiple parties (for example trustee, underlying companies and beneficiaries) it will still be necessary for each party to register separately for the WDF and for the report to be submitted for each party

(g) Trustees

- In the case of a change of trustees but where the trust remains the same settlement, the new trustees can and should make the correction even if the non-compliance occurred during the trusteeship of a previous trustee. The liability is that of the trust and anyone authorised to act on behalf of the trust, including new trustees, can make the correction

(h) Deceased taxpayers

- Personal representatives (PRs) do not inherit the deceased's "relevant offshore tax non-compliance" so they have nothing to correct
- If a taxpayer dies after the end of the RTC period without having corrected "relevant offshore tax non-compliance", in line with their normal practice, HMRC will not charge FTC penalties on the deceased's estate
- There may be occasions where other parties (not the PRs) may have a requirement to correct – such as trustees – and this should always be considered

4. Asset based penalty (para 28 (2)(b))

- An asset-based penalty will be charged if "the person was aware at any time during the RTC period that at the end of the 2016/17 tax year P had relevant offshore non-compliance to correct" and the other criteria are met. The asset-based penalty is in point if P is aware of the non-compliance, but P does not also have to have been aware of the RTC. Awareness connotes actual awareness, and includes:

    - Deliberate errors/failures in the years covered by RTC

    - Where, before the end of the RTC period, the taxpayer was advised that they had offshore issues to disclose and they failed to correct

5. Interaction with Disguised Remuneration (DR) Settlement Terms

- HMRC's RTC Guidance does not cover the DR Settlement Terms Guidance so it does not explain what will happen where a taxpayer has not finished the correction process on a DR settlement by 30 September 2018. If in

doubt, discuss the position with the HMRC officer handling your client's DR enquiry and / or contact HMRC at consult.nosafehavens@hmrc.gsi.gov.uk.

- Some DR settlements must include liabilities by way of "voluntary restitution". HMRC's view is that any amounts that fall within "voluntary restitution" are not liabilities in need of correction at April 2017 (para 3(1)(b)). Consequently, they are outside the scope of RTC and no FTC sanctions can arise in relation to them