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HMRC letters and "certificates of tax position" to individuals with offshore income, gains & assets

An update for CIOT members

This update provides some background to and information about the letters and some guidance to help members decide the most appropriate way to respond if a client receives one of the letters. Before publishing this update, we shared it with HMRC to check that it accurately reflects HMRC's position.

Background

Over the past couple of years, HMRC have been sending out letters to UK individuals who they have identified as having received income, gains or assets from overseas accounts or investments. These have been prompted by information HMRC have been receiving from overseas tax authorities under Automatic Exchange of Information (AEOI) agreements about UK residents with financial accounts and investments overseas. As noted, the letters are targeted at individuals whom the data identifies as having received income, gains or assets from overseas accounts or investments, and HMRC also undertake some additional risk assessment before sending the letters.

The UK has AEOI agreements under four regimes:

1. United States Foreign Account Tax Compliance Act (FATCA) – this requires financial institutions outside the USA to pass information about the accounts of US persons to the US Internal Revenue Service (IRS). As part of the Intergovernmental Agreement (IGA) between the UK and USA, the US has agreed to provide the UK with reciprocal data on the US accounts of UK persons. The regulations implementing the IGA came into force on 30 June 2014.
2. Crown Dependencies and Overseas Territories - the UK has reciprocal agreements with Gibraltar, Guernsey, the Isle of Man and Jersey. Under these agreements, each government commits to an annual automatic exchange of information relating to financial accounts maintained by financial institutions in their territory which belong to the other party's tax residents and have effect for accounts maintained on or after 30 June 2014.
3. The Organisation for Economic Co-operation and Development (OECD's) Common Reporting Standard (CRS) - the standard for all automatic exchange of financial information. Over 100 countries have committed to adopt the CRS. Exchange of information began in 2017 and 70 signatory countries exchanged data from 30 September 2018.
4. Directive on Administrative Co-operation in the field of taxation – Council Directive 2011/16/EU provides for the exchange of information between tax authorities of EU member states (i.e. it applies the CRS throughout the EU).

What's in the letters?

HMRC's letters use standard wording and start by informing the individual that HMRC have information which shows that they have an interest in overseas property or have received overseas income or gains which may be taxable in the UK.

Some of the letters the CIOT is aware of are:

March 2017	based on information from the US IRS under the IGA to improve international tax compliance and implement FATCA

February 2018	based on information from AEOI with the Crown Dependencies and Overseas Territories
February 2019	based on information from tax information exchange agreements with other countries, including as a result of the CRS.
February 2020	based on information from tax information exchange agreements with other countries, including as a result of the CRS (with some changes in the wording of the letter and Certificate of Tax position compared to the February 2019 version).

The most recent letters have come from HMRC's "Risk and Intelligence Service, Offshore". The February 2020 version of the letters tells the individual that there may be a reasonable explanation for the information which has been identified but this is an opportunity for them to check that their affairs are up to date, and that it is important they check that they have declared all their UK tax liabilities. The letters suggest seeking professional advice if the person is not sure whether they have declared all their overseas income or gains.

The letters also say that if there is anything about the person's health or personal circumstances that may make it difficult for them to deal with the matter, they should tell HMRC so HMRC can help them in the most appropriate way.

We understand that the letters are being copied to the individual's tax agent if they have one.

They generally give 30 days to respond and some of them include a "Certificate of Tax Position" form which HMRC ask the individual to complete and return whether they have additional tax liabilities to disclose or not. We understand that one reason why HMRC use the "Certificate of Tax Position" is because it helps them minimise the number of "no response" cases they would otherwise need to follow up.

On the certificate, the individual 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" [this is identical to the declaration on the self-assessment tax return Box 22 of SA100]; and
b) They understand that choosing to make a false statement or complete a false certificate is a criminal offence that can result in investigation and prosecution [this is similar, but not identical, to the declaration on the SA100 which is "I understand that I may have to pay financial penalties and face prosecution if I give false information].

They are also asked to tick that either:

a) Their tax affairs need to be brought up to date and they will make a disclosure of irregularities through the Worldwide Disclosure Facility (WDF); or
b) Their tax affairs do not need updating and they do not have additional tax to pay. There is then a further declaration: "I have declared all of my offshore income, assets and gains". Previous versions of the letter included the words "which are taxable in the UK" at the end of the sentence.

<u>What you should do if a client receives one of these letters from HMRC</u>

1. Check the position.

   It should be noted that HMRC are saying in the letter that they are aware the person has overseas income, not that their tax return is necessarily wrong. However, HMRC do carry

out some risk assessment before sending a letter, so it will clearly be essential to check whether the individual's tax affairs are correct and complete to the best of their knowledge and belief before responding to the letter.

We are also aware that discrepancies in the data may exist due to it often relating to a calendar year, thereby crossing over two UK tax years, and because it does not come into HMRC in a standard format. This is expected to affect mainly the early years of data exchange and should become less of an issue as we move into future tax years and HMRC's systems become more sophisticated at analysing the data they receive.

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

    a. If a disclosure needs to be made, use the WDF (or another appropriate method).

    If a disclosure is required, the letter advises that this must be made via the WDF. However, HMRC cannot compel a taxpayer to use any specific method for their disclosure and using the WDF may not necessarily be the most appropriate method. Depending on the individual circumstances of the taxpayer, other approaches may be better e.g. COP9 (Contractual Disclosure Facility). Agents should therefore consider their client's specific circumstances and advise on the most appropriate method for a disclosure. As noted, this may not always be the WDF.

    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 handle a disclosure themselves.

    It is also important to note that there is no *de mimimis* level below which mistakes do not need to be disclosed.

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

    HMRC will accept a response by letter should an individual choose not to complete the "Certificate of tax position" (see 3. below).

    Where no response is received, HMRC will follow up so not responding at all will attract more attention from HMRC. Follow up is likely to be by a further letter in the first instance. If no response is forthcoming after the second letter, HMRC will consider the most appropriate action to take next following further risk assessment. This could range from contacting the person by telephone to opening an enquiry or investigation.

    Responding to the initial letter will therefore mitigate the risks of further action being taken by HMRC.

If possible, try to respond within the 30 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 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 to sign and return the "Certificate of tax position".

   Although the declarations in the "Certificate of tax position" are similar, if not completely identical, to those on the self-assessment tax return, there are two important differences.

   Unlike the tax return:

   - There is no legal obligation on the individual to complete the "Certificate of tax position" and return it to HMRC; and
   - 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 years.

   The certificate does not have a *de minimis* level.

   The individual should consider very carefully whether to sign and return the certificate, regardless of whether they have irregularities to disclose or not. When advising a client who has received one of these letters, it will clearly be important that these consequences are made clear to them.

   In discussions between the CIOT and HMRC, HMRC have agreed that there is no legal obligation for the individual to complete and return the certificate to them. They have told us that they will accept a response by letter as an alternative should an individual choose not to complete the declaration.

   As mentioned, in view of the serious consequences of making a false declaration, it may therefore be preferable to respond by letter to HMRC, particularly if, after reviewing their tax affairs, the individual believes that their affairs are correct and up to date and they do not need to make a disclosure. The wide wording of the declaration (which, as mentioned above, no longer limits it to offshore income, assets and gains taxable in the UK), also indicates that a response by letter would be preferable since responding by letter enables an explanation to be included, which could pre-empt further queries by HMRC. For example, in the case of a non-UK domiciled individual, to confirm that no funds were remitted to the UK and that all the funds deposited into the account came from funds on which UK tax was paid as appropriate in past years (i.e. that there may have been offshore income, gains or assets which have legitimately not been disclosed).

   As mentioned, HMRC's letter does require a response, in one form or another. If the individual needs to make a disclosure but chooses not to complete the "Certificate of tax position", it would be good practice to respond to HMRC's letter in writing and advise HMRC that a disclosure via the WDF (or other method) is being made.

With data from overseas now being constantly received under AEOI agreements, HMRC are adopting an approach of sending out batches of letters at regular intervals. Members should be aware that this approach will continue for the foreseeable future.

Chartered Institute of Taxation

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Updated 10 March 2020 (for changes in the wording of HMRC's letter and Certificate of Tax Position)