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FEATURES INCLUDE

Law & Reporting
Collaborative law

Banking & Finance
Islamic banking

Plain sailing?

Experiences of regulatory
environments in the UK and Hong Kong



Offshore disclosure - the clock is ticking

HMRC's generous amnesties on offshore holdings won't last forever, warns **Tim Keeley**

Readers may remember that in 2007 new ground was broken by HM Revenue & Customs (HMRC) when the Offshore Disclosure Facility (ODF) was announced. At the time it was meant to be a 'one-off' opportunity – amnesties (or near amnesties) have never really been part of the psyche of UK tax administration – and there was no expectation whatsoever that further opportunities to disclose evaded tax would be offered.

The 2007 disclosure facility netted the Exchequer GBP 400 million for an outlay of GBP 6.5 million and led to around 65,000 disclosures. Certainly it was cost-effective, but may have left HMRC with the clear view that there were many others who should have taken advantage of the facility offered but failed to do so.

Fast-forward to 2009, and two further disclosure opportunities have now been offered by HMRC. Both relate to funds and other assets held offshore, and both are said by HMRC to represent a final opportunity to disclose on what are indisputably generous terms. Time is, however, running out. Not only are the current disclosure opportunities limited by a strict window, but both must be taken in the context of a significant increase in bi-lateral agreements to exchange information, with jurisdictions such as the Channel Islands, the Isle of Man, Gibraltar, and, notably, Liechtenstein, viewed by many as one of the most secretive jurisdictions on the planet. Such locations are anxious to remain open for international business but only by becoming more transparent and by exchanging information with

the authorities of conventional tax-paying jurisdictions. Those using such jurisdictions for the purpose of tax evasion alone are likely to face an increasingly icy chill.

What if the present disclosure opportunities are missed?

Taxpayers can look forward to a stricter penalty regime, which comes into force for tax returns covering income and gains arising after 1 April 2008. The penalties of 10-20 percent offered by the current disclosure opportunities are almost certain to be dwarfed by expected penalty loadings of 50 percent or even more, with the attendant risks of 'naming and shaming' and even criminal prosecution for the most serious cases of tax evasion.

HMRC has offered two disclosure opportunities. These are in many respects similar, but there are also important differences between the two. Each will be considered in turn.

HMRC has published very clear and helpful guidance on its website regarding each disclosure opportunity; these can found under the descriptions NDO and LDF. Anyone wishing to make a disclosure, or to advise that a disclosure should be made, is strongly recommended to read the information that HMRC has published on its website, including the 'frequently asked questions', beforehand.

New Disclosure Opportunity (NDO)

The key features are as follows:

- coverage: 20 years back from 5 April 2008;
- included: offshore disclosure of tax irregularities plus UK tax irregularities, but only if there are also offshore

irregularities. UK tax irregularities alone do not qualify for this opportunity though logic would dictate that HMRC should consider extending the same opportunity to solely UK based disclosures;

- notifying HMRC: Online disclosures can now be made from 1 October 2009 to 4 January 2010 (originally the latest notification date was 30 November 2009) following a recently announced extension to the original deadline.;
- detailed disclosure: this must be done no later than 31 January 2010 if the disclosure is to be made by paper. Those making an online disclosure can do so from 1 October 2009 to 12 March 2010;
- penalties: if the evaded tax is less than GBP 1,000, there will be no penalty. For other cases, the penalty will be only 10 percent if the taxpayer discloses purely voluntarily and has not been contacted by HMRC in relation to the previous offshore disclosure facility (ODF) offered in 2007. For those who were contacted by HMRC in relation to the 2007 ODF and who were then offered a 10 percent penalty but failed to use that facility, the penalty will be 20 percent;
- criminal prosecution: not within the terms of the NDO, and HMRC states in the 'frequently asked questions' on its website that no guarantee can be given. However, the safest protection against criminal prosecution is a purely voluntary disclosure, and HMRC's response in its 'frequently asked questions' gives some comfort in this direction. Nevertheless, anyone concerned about the risk of prosecution is advised to read the text that HMRC has published on its website.



It is also unlikely that anyone who has evaded tax by placing funds offshore will reduce his risks of prosecution by keeping a low profile.

The Liechtenstein Disclosure Facility (LDF)

The terms of this facility are as follows:

- coverage: only ten years, going back from 5 April 2009;
- included: any offshore disclosure of UK tax that is connected to a Liechtenstein bank account or to other assets held in Liechtenstein. If a disclosure also covers UK evaded tax, it can be made on the same basis as the disclosure for the Liechtenstein assets, but, as with the NDO, tax irregularities that are solely UK-based are not covered by the LDF;
- notifying HMRC: the time period is comparatively generous. For assets held in Liechtenstein as at 1 August 2009 the period is 1 September 2009 to 31 March 2015. For assets moved to Liechtenstein after 1 August 2009 the time period is 1 December 2009 to 31 March 2015;
- penalties: a 10 percent penalty applies. This is based upon the evaded tax which for the purpose of this facility is taken as 40 percent of the evaded income and/or gains;
- criminal prosecution: HMRC has stated that, provided the funds do not originate from criminal activity (which for the purpose of this disclosure does not include tax evasion), there will be no prosecution.

The sting in the tail

Liechtenstein will be passing legislation

within the next year to identify 'relevant persons', and we can expect that such persons will be asked by their intermediaries in Liechtenstein to demonstrate that they are fully UK tax compliant. They can do this either by using the LDF and offering a certificate to prove that they have registered under the facility, or by providing a letter from their tax adviser, accountant or lawyer to confirm that they are fully compliant. Should the taxpayer fail to comply, then either the intermediary will have to refuse to continue to act, or take alternative action (the nature of which is not yet clear but which could easily involve imposing a local withholding tax).

Do more disclosure opportunities lie ahead?

It is difficult to say. HMRC has traditionally disliked the idea of amnesties (or quasi-amnesties) and it is difficult to see how credibility and deterrence of tax evasion can be maintained in the long run if each new opportunity or facility is announced as being final, only to be followed by another. It is therefore unlikely that disclosure opportunities or facilities (depending upon one's choice of vocabulary) will be a regular and recurring feature of UK tax administration.

However, in the current economic climate, HMRC will wish to collect as much revenue as it possibly can to help the Exchequer. It currently holds a vast store of information, much of it as a result of requiring banks to disclose

details of offshore accounts, and will soon augment this as the bilateral agreements with low-tax regimes come on stream. It will want to turn the value of this information to account, but equally is unlikely to be offering penalty rates of only 10-20 percent indefinitely. If any disclosure opportunities are offered in the future, it cannot be guaranteed (and may be extremely unlikely) that they will be as generous to the taxpayer as those currently available.

Tax minimisation that is reliant on holding funds and other assets offshore without declaring them has never been anything other than a form of tax evasion. Keeping below the parapet whilst the current disclosure opportunities are available is unlikely to be a sound strategy. It is possible, indeed likely, that HMRC may decide to accept many disclosures without detailed checking, but there can be no guarantee of this, especially if the scale of the disclosure is large and covers many years. There is no substitute for experience, and therefore there is much to be said for making a disclosure with the support of tax professionals who have a proven track record in handling enquiries with the senior investigation offices of HMRC.

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