

KPMG Channel Islands Limited

Requirement to correct



HMRC's crackdown on offshore tax non-compliance continues with the introduction of a legal obligation for those impacted to correct any issue in relation to their 'offshore matters' that has given rise to a UK tax liability. This requirement is described as a **'Requirement to Correct ("RTC")'**.

RTC requires any tax issue mainly or wholly relating to offshore matters for all periods up to 5 April 2017 to be corrected by **30 September 2018**. Where tax liabilities that have not been corrected by this date and are subsequently established / disclosed, penalties for **'Failure to Correct' ("FTC")** will bite. It is the failure to correct which is penalised, not the original behaviour which led to the tax liability. Consequently, FTC penalties could apply to those who are found to have tax liabilities which are due to careless or deliberate behaviour, or even for those who took reasonable care i.e. there is no soft touch for those who have made innocent errors in their offshore tax affairs.

Penalties will start at **200% of the tax liability** (can be reduced but no lower than 100%). For the most serious cases, an additional penalty of up to **10% of the value of the relevant asset** will apply as well as the reputational damage of being **'named and shamed' on a public website**. The only defence to FTC is that someone had a reasonable excuse to not correct before 30 September 2018. The provisions in the legislation specifically disqualifies tax advice received in certain situations.



Who is impacted?

Individuals, companies and trustees with offshore interests who have a UK tax liability need to review their UK tax affairs to ensure they are compliant.

What taxes are included?

Income Tax, Capital Gains Tax (including CGT for non residents) and Inheritance Tax although all tax liabilities should be brought up to date.

When must the correction be made by?

By 30 September 2018, but anyone with issues to address should do so as soon as possible to ensure maximum mitigation for an unprompted disclosure is achieved. Note that unlike previous disclosure facilities, it is necessary for the position to be corrected by 30 September 2018 rather than simply needing to notify HMRC by that point.

What periods need to be corrected?

This depends on specific circumstances. The relevant years to be corrected and penalties are based on behaviour but broadly it will be at least the last 4 years (for non-careless behaviour), 6 years (for careless behaviour) or 20 years (for deliberate behaviour). RTC applies to liabilities outstanding at 5 April 2017.

How will the penalties work?

For those who fail to correct by 30 September 2018, the penalty will start at 200% of the tax liability not corrected. Although this can be mitigated, it cannot be reduced below 100%.

Is there any defence against the penalty?

The only defense is that a person had a reasonable excuse not to correct. However, the definition of reasonable excuse is drawn narrowly.

Even in cases where tax liabilities are subsequently found to exist, despite having originally taken advice from a competent professional adviser, that advice could be 'disqualified' from being a reasonable excuse.



Advice is generally disqualified if:

- The adviser was 'interested' in any avoidance/planning put in place;
- The advice did not consider all the relevant facts and circumstances (high level advice may therefore be disqualified);
- The advice was not addressed to the taxpayer.

Example of how RTC could work in practice - Trustee

A Guernsey domiciled individual set up a relevant property trust in Guernsey in 2005. The market value of the trusts UK situs assets in 2015 was £10m (held at trust level) and the trustees would be liable to a IHT ten year charge on this value. If the relevant return and associated liability has not been paid the implications are as follows (simplistic calculations used for ease):

Impact of making a full voluntary disclosure now

- Tax at circa £580,500, plus interest
- Likely penalty of £3,200

Impact post 30 September 2018 if no correction

- Tax – £580,500, plus interest
- Penalty – minimum of £580,500 up to maximum of £1.16 million

And if it was deliberate behaviour, post 30 September 2018

- Tax – £580,500, plus interest
- Penalty – minimum of £580,500 up to maximum of £1.16 million + additional 50% if attempt to avoid CRS or RTC
- Asset based penalty of up to £1,000,000
- "Naming and Shaming"

The RTC and Offshore Trusts

From our experience, the key areas of non compliance include:

- Missed IHT 10 year anniversary charges in respect of UK situs assets held;
- Trustee income tax liabilities in respect of UK source income; and
- Non-resident landlord liabilities in respect of rental income received from UK property held in offshore structures.

All of the above will trigger **trustee or company liabilities**.

Trustees should consider distributions made to UK resident beneficiaries and the extent to which they are comfortable they have been appropriately matched to relevant income and/or stockpiled gains within the trust, although these are matters for the individual recipient to cover.

Failure to correct non-compliance in any of the above situations by 30 September 2018 will trigger a minimum of 100% penalties for either the trustee or the beneficiary.

Next steps - trustees

- Undertake a risk assessment to help form a strategy for reviewing structures you administer.
- Ensure a tax adviser is in place to assist with remediation and disclosure where non-compliance is identified.
- If reliant on a reasonable excuse defence, ensure the advice you are relying on will not be disqualified and is 'current'.

Next steps - individuals

- Those who know they have undisclosed assets/income should take advice and make a disclosure to HMRC.
- It is possible that the Worldwide Disclosure Facility ("WDF") is the best option (see aside) but alternative disclosure methods may also be appropriate.
- For anyone who is not absolutely certain that their offshore affairs are compliant, they should review their position and make any disclosure/correction as appropriate.

How KPMG can help

- Facilitate workshops to help develop approach;
- Undertake client reviews;
- Review historic advice for reasonableness;
- Perform health checks;
- Preparing outstanding returns;
- Advising on relevant liabilities; and
- Assist with HMRC disclosure.

HMRC's Worldwide Disclosure Facility

- Opened 5 September 2016
- Available through to 30 September 2018
- Disclose UK tax liabilities that relate wholly or partly to an offshore issue
- No immunity from prosecution
- No beneficial financial terms, but do not face the significant penalties/sanctions post RTC
- Two stage process -(1) Notification, (2) Complete disclosure & pay tax, interest and penalties within 90 days (180 days in complex cases)
- Requirement to self-assess behaviour to determine years to include in disclosure and level of penalties
- Complex issues and pre disclosure agreement - in some circumstances clarification can be sought from HMRC pre disclosure submission using the non-statutory clearance process
- Disclosure needs to include the maximum value of offshore assets at any point in the last five years
- 'Onshore' liabilities should also be disclosed if WDF is being used
- HMRC to acknowledge disclosure within 15 days and aim to tell course of action within 40 days of this. HMRC will check disclosures and investigate if necessary
- Need to consider alternative disclosure options- e.g. Contractual Disclosure Facility (COP 9)- dependent on the facts of the case
- Available to individuals, executors, companies, trustees where there is a UK tax liability



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