GMS Flash Alert

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United Kingdom – New Rules, Penalties on Offshore Tax Non-Compliance

The new "Requirement to Correct" (RTC) programme and the associated severe penalties for "Failure to Correct" (FTC) potentially apply to anyone:

- with historic U.K. tax liabilities relating to offshore tax non-compliance potentially assessable on or before 5 April 2017, and
- who fails to correct that non-compliance by 30 September 2018.[1]

This may include U.K. resident and domiciled individuals, U.K. resident and non-U.K. domiciled individuals, non-U.K. residents (including business travellers) and offshore trustees. It applies equally to those who have deliberately evaded tax, those who have failed to pay the correct amount of tax through a careless error, or even those who have taken reasonable care but where the advice they have received is "disqualified."

WHY THIS MATTERS

These measures are further evidence of HM Revenue and Custom's (HMRC's) continued crackdown on offshore tax evasion and non-compliance. With penalties of a minimum of 100 percent (and up to 200 percent) of the tax under-paid, plus a 10-percent asset-based penalty and "naming and shaming" in the most serious cases, the sheer size of potential penalties is important to note and signifies a step-change in HMRC's approach to dealing with those who fail to put right their historic non-compliance.

The key to the new FTC penalties is that they are not in respect of the behaviour that led to the original non-compliance, as with standard penalties, but instead they relate to the person's failure to take steps to correct that non-compliance within the RTC period.

Those who have historic tax liabilities to disclose resulting from careless errors (for example, because advice taken some time ago has become out of date) will be subject to the new FTC regime in the same way as those who have deliberately evaded tax.

It is therefore important that those with any doubt concerning U.K. tax issues linked to "offshore tax non-compliance" – and this includes business travellers and international executives that incurred a U.K. tax liability that remains undeclared and unpaid – should now review their affairs as soon as possible and take appropriate advice. In particular, taxpayers may wish to consider reviewing past filings to identify any risks and to provide appropriate reassurance.

Overview of the Measures

The summer Finance Bill 2017 currently progressing through Parliament includes the new RTC legislation to deal with historic offshore tax evasion and non-compliance.[2] It contains the obligation for taxpayers to make sure that any U.K. tax non-compliance in respect of "offshore matters" and "offshore transfers" over the period up to and including the end of the tax year 2016-17 is fully disclosed to HMRC before 30 September 2018. Liabilities in respect of income tax, capital gains tax, and inheritance tax are within the scope of RTC.

The end date of 30 September 2018, corresponds with the date by which all countries committed to the OECD's Common Reporting Standard ("CRS") will be exchanging data with HMRC. In particular, HMRC considers that by this time, in any event, it will have the necessary information to be able to raise enquiries with taxpayers regardless of whether or not matters have been disclosed.

Penalties

Taxpayers who fail to correct historic errors in the "RTC period" (6 April 2017 to 30 September 2018) will face much tougher new penalties for their failure to correct. FTC penalties include:

- a standard penalty of between 100 percent and 200 percent of the under-paid tax that has not been corrected;

- a 10-percent asset-based penalty (relevant to the most serious cases where tax under-paid in a tax year is greater than £25,000);

- an enhanced penalty of 50 percent of the standard penalty where there is a "relevant offshore asset move" which is by way of an attempt to avoid the RTC; and

- potential naming and shaming of taxpayers in the most serious cases (i.e., where the total loss of tax is greater than £25,000).

These new penalties are far tougher than those applicable under present legislation.

Reasonable Excuse

The only defence for those who fail to correct liabilities in the RTC period is a "reasonable excuse" for not meeting this obligation. That said, in elaborating on what is/is not a reasonable excuse, the legislation restricts the circumstances in which taxpayers can rely on tax advice they have received for not having corrected their tax affairs during the RTC period. In particular, certain advice is disqualified, for example where it is given by an "interested person" (which has a wide meaning). Accordingly, taxpayers will need to be very careful from whom they take advice on the RTC, if they are to be able to rely (as necessary) on a reasonable excuse defence.

Making Corrections

The method that taxpayers may use to make corrections will depend on their circumstances. For example, corrections can be made by submitting outstanding tax returns, by delivering information to HMRC through an enquiry (or another method agreed with an officer of HMRC), or by using an existing method for disclosure (such as the Worldwide Disclosure Facility (WDF) or the Contractual Disclosure Facility (CDF) which might be more appropriate for more serious cases).

In order to prevent tax falling out of assessment during the correction period, and to give HMRC a reasonable period to take action after the end of that period, RTC provides for an important extension to existing assessment periods. This will mean that any tax that is potentially assessable on or before 5 April 2017 (which will extend to the 2015/16 tax return where the filing deadline was 31 January 2017) will remain assessable until at least 5 April 2021.

KPMG LLP (U.K.) NOTE

The OECD's CRS initiative entails an agreement to increase tax transparency and tackle tax evasion against a backdrop of recent events such as the leaking of the Panama papers. We consider that the information HMRC will receive further to the CRS could indeed provide a powerful weapon to deploy against those who are non-compliant. RTC is HMRC's warning shot to taxpayers to comply or face the consequences – as HMRC put it recently in a communication to taxpayers "Come to us before we come for you."[3]

In the world of the globally mobility, it is quite normal for international assignees to have offshore banking and financial arrangements as result of retaining accounts and investments in their home location. And, under U.K. law, assignees who are resident and not domiciled in the U.K. can make a claim for the "remittance basis," which means that their non-U.K. investment income and gains are generally not taxable in the U.K. if they are not remitted to the United Kingdom. As a consequence of CRS, HMRC will nevertheless receive information about such income and gains and may open investigation proceedings which could be intrusive and time-consuming to deal with. Of greater concern would be cases where amounts have been inadvertently remitted to the U.K. – as then the RTC/FTC regime and the associated penalties could apply – if the position remains uncorrected at the end of 30 September 2018. The RFT/FTC regime could also apply where "overseas workdays relief" has been claimed for non-U.K. source employment income and there is a mistake in either (i) the attributable non-U.K. employment income or (ii) the number of non-U.K. work-days that results in an under-payment of U.K. tax.

Those not on the remittance basis may also want to review the calculation of any non-U.K.-source income or gains given some of the complexities of the U.K. legislation and taking account of the penalties applicable under RTC/FTC in relation to any mistakes.

Business visitors to the U.K. will also be impacted where any tax is due on business trips to the U.K. and (for whatever reason) no treaty exemption applies, but tax has not been declared and paid.

The naming and shaming aspect of the penalties may be of particular concern to senior executives due to the impact this could have both on their own reputation and that of their employers. Accordingly, taxpayers may wish to consider reviewing past filings to identify any risks and to provide appropriate reassurance.

FOOTNOTES:

1 See the HMRC Policy Paper, "Tackling offshore tax evasion: requirement to correct". For a KPMG LLP (U.K.) report on this development, see "Draft Finance Bill 2017: 'Requirement to Correct'; offshore tax evasion and non-compliance," (8 December 2016).

For additional information, see the webpage for the House of Commons, Committee of the Whole House proceedings on Finance (no. 2) Bill.

To track the status of the Finance Bill, click here.

2 See Finance Bill (HL Bill 102) (Schedule 17, Schedule 18).

3 See HMRC's "If you have money or other assets abroad, you could owe tax in the UK."

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£1 = $1.31
£1 = ₹85.63
£1 = C$1.66
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