TACKLING OFFSHORE TAX EVASION: A REQUIREMENT TO CORRECT

ICAEW welcomes the opportunity to comment on the consultation paper *Tackling Offshore Tax Evasion: A Requirement to Correct* published by HM Revenue & Customs on 24 August 2016.

This response of 19 October 2016 has been prepared on behalf of ICAEW by the Tax Faculty. Internationally recognised as a source of expertise, the Faculty is a leading authority on taxation. It is responsible for making submissions to tax authorities on behalf of ICAEW and does this with support from over 130 volunteers, many of whom are well-known names in the tax world.

This response is based largely on detailed comments on the above consultation document that have been prepared and submitted by the Tax Investigation Practitioners Group (TIPG). The TIPG is a multi-disciplinary body which brings together nearly 150 tax and VAT investigation specialists. Its members specialise in assisting taxpayers who have failed to meet their tax obligations to come forward and put their tax affairs in order. It includes a number of chartered accountants who are also members of the Tax Faculty. The Tax Faculty's committee responsible for this area of our work is the Enquiries and Appeals committee and the TIPG draft was prepared and reviewed by members of that committee. As the draft has been prepared by specialists common to both the TIPG and the Tax Faculty, it has accordingly also been adopted by the Tax Faculty, together with some additional comments.

We should be happy to discuss any aspect of our comments and to take part in all further consultations on this area. We also appreciated the opportunity to meet with members of the HMRC team responsible for the consultation and discuss areas of concern and how we might work with HMRC to educate and inform tax agents and their clients about these measures.

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ICAEW members operate across a wide range of areas in business, practice and the public sector. They provide financial expertise and guidance based on the highest professional, technical and ethical standards. They are trained to provide clarity and apply rigour, and so help create long-term sustainable economic value.

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MAJOR POINTS

Impact on existing disclosure initiatives

1. We would welcome clarification as to how the Requirement to Correct affects existing disclosure initiatives. If a person has already registered with HMRC under the Worldwide Disclosure Facility or the Contractual Disclosure Facility but has not finalised his disclosure by 5 April 2017, does the requirement to correct require the person to do anything further?

2. The Requirement to Correct is intended to emphasise the duty to disclose, but we would welcome clarification as to how this should be done because the Digital Disclosure Service does not currently cater for non-resident trustees or offshore companies.

3. We would welcome clarification as to whether HMRC will regard a correction under the Requirement to Correct (RTC) (or as a result of a notification under the statutory requirement for financial intermediaries and relevant intermediaries to write to their clients pointing out the impact of the Common Reporting Standard (CRS)) as being a prompted disclosure. We believe that such disclosures should be treated as unprompted as neither the RTC nor CRS letters from intermediaries to clients, albeit arguably prompts, are indications that HMRC are or may be aware of the omission.

Taxpayer publicity and working with tax agents

4. We are concerned about how taxpayers will be made aware of the new requirements. There needs to be a major HMRC publicity drive across the general media rather than only on HMRC's website. Taxpayers will not necessarily aware of the new Requirement to Correct and the various related measures and we are concerned that the message may not get across.

5. More generally, agents have a potential role to play in helping to get over the messages and encourage clients to come forward and regularise their affairs. However, this is a specialist area and many tax agents and advisers will not be aware of the new requirements and how they might help to address it. There is a role for HMRC to work with the professional bodies to educate the tax agent community about these requirements and how they might help their clients to come forward to help regularise their affairs.

Level of penalties

6. Clearly setting the level of penalties requires careful judgement: too low and you risk incentivising non-compliant behaviour and too high and you risk taxpayers staying non-compliant. We are concerned that the proposed penalties are too high. While not in any way seeking to condone tax evasion, we are concerned that if a taxpayer does not come forward under Requirement to Correct, the level of proposed penalty is such that they are very unlikely to come forward in the future.

7. An alternative approach would be that a limited form of suspended penalty could apply for making a full disclosure, eg the new 100%+ regime applies but, for a full disclosure, the existing normal penalty rules will apply with the balance suspended, or some variation on this approach.

RESPONSES TO SPECIFIC QUESTIONS

Q1: Are there any key circumstances missing from the proposed scope and definition or do you foresee any difficulties with applying this definition?

8. We do not see any obvious problems with the proposed definition.

Q2: What are your views on limiting the scope of the RTC to those taxes currently covered by offshore penalties?

9. We are not clear why this does not extend to VAT as evasion of income tax often necessitates evasion of VAT on the same income.

Q3: What, if any, other taxes should we look to include within scope?

10. As per our response to Q6 above, we believe that VAT should be included in the scope.

Q4: Do you foresee any issues with a window to correct covering the period April 2017 to September 2018? Should we consider any other dates for the window?

11. We believe that a window up to 30 September 2018 is reasonable although it is a not a date that is linked to the UK's tax year. It might make more sense to extend the window to the end of that tax year, ie to 5 April 2019.

Q5: What is your view on capturing all compliance issues that exist up to and including 5th April 2017? Do you foresee any circumstances that this may miss?

12. We are concerned that the inclusion of failure to notify chargeability is likely to unfairly penalise many innocent people. Failure to notify chargeability is not necessarily an indicator of offshore evasion. For example, there is currently no obligation for a non-domiciled person to notify HMRC of the existence of offshore income or gains. Indeed, at the time of the 2008 changes to the remittance basis rules, the government specifically stated that it was not seeking to impose such an obligation. The obligation under s 7, TMA 1970 is to notify HMRC that a person has taxable income or gains from any source. It apples only where he has not been asked to complete a tax return and is not within the scope of PAYE.

13. Those who evade tax generally complete a return, but include incomplete information on it. Apart from those in the hidden (or black or shadow) economy, there are two categories of people who are likely to innocently fail to notify, namely:

- non-domiciled taxpayers who have no UK income and gains and live off capital but, because historically they have had no need to interact with HMRC, do not realise that the remittance basis rules changed in 2008 and that from that date they need to pay a fee to continue to utilise the remittance basis; and

- those who have no income but either do not realise that anti-avoidance provisions can create deemed income and gains, or believe incorrectly that they are not caught by an anti-avoidance provision.

14. We do not think it is reasonable to penalise either category of such people set out above beyond the existing failure to notify penalty.

Q6: Do respondents have any concerns about this approach to correcting?

15. We are happy with the approach. Our concern is that if a person is unaware that he has a UK tax liability, he will not know that he has anything that needs to be corrected.

Q7: Are there any other approaches to correction we could consider?

16. Not that we can think of.

Q8: What are your views on using the standard assessment periods to define the contents of the RTC?

17. We believe that the rules should follow the standard assessment periods. We would, however, point out that the standard periods set out at 4.21 fail to mention that a 20-year period applies to failure to notify, even where such failure is entirely innocent. In such cases the existing rules are already unfair and a further penalty will only exacerbate the unfairness.

Q9: What are your views on handling the issue of taxpayers delaying to allow years to pass out of assessment time limits in this way? Are there any other approaches you believe we should consider?

18. We think that changing the normal assessing time-limits is a unnecessary complication. The only scope for manipulation is to delay correction from 2016/17 to 2017/18, so it only affects one year. We doubt that anyone would deliberately delay, bearing in mind the intense HMRC publicity surrounding CRS.

Q10: What are your views on a proposal to extend the assessment period for tax and penalties to ensure years do not drop out of assessment as the CRS data arrives? Could we address this issue in any other way?

19. We do not think there should be a problem. As assessments are based on tax years, if a correction is made on 30 September 2018, nothing will drop out of assessment unless HMRC fail to assess by 5 April 2019, which is six months after the latest date for notification. This will also provide time for HMRC staff to raise a protective assessment.

Q11: What are your views on the proposed contents of a correction? Do you foresee any issues or further information we should seek?

20. We think that a requirement to correct should do what "it says on the tin", namely to disclose the income and gains omitted from the return. It is unreasonable to expect a taxpayer to calculate tax and interest, perhaps for 20 years, within a short window. In many cases it will take longer than that to identify the exact amounts involved and the years into which an item falls. The objective should be to make HMRC aware of the error or omission so that they can raise a protective assessment by 5 April 2018. Time is needed to get the actual assessment right.

Q12: We would be interested in views on whether HMRC should consider further information powers to support the RTC or more widely the CRS?

21. Sch 36 of FA 2008 is very widely drawn. We would welcome clarification as to what information HMRC believes it may need which cannot be obtained under Sch 36.

Q13: Do respondent have any alternative ways of handling the issue of ongoing enquiries? Are there alternatives to extending the window in these circumstances?

22. This problem arises only because of the proposal at Q11. If the correction does not require a computation of the omitted income, there is no problem with enquiry cases. The real problem is a different one, namely that the correction is likely to generate a great many more enquiry cases. It would not be reasonable to penalise a person who comes forward merely because both HMRC does not have the resources to resolve enquiries expeditiously and the information needed to resolve enquiries in relation to matters that occurred many years ago is unlikely to be readily available.

Q14: Are there other complex situations we need to give special consideration to?

23. If a taxpayer has entered into a tax avoidance scheme, it may not be possible to calculate a tax liability on undisclosed income until the efficacy or otherwise of the scheme has been resolved by the Tribunals and Courts.

Q15: What do you think should be included within the scope of reasonable excuse for not having met the obligations of the RTC? What do you think should not be included as a reasonable excuse?

24. We do not think that HMRC should seek to circumscribe what is a reasonable excuse. This should depend on the facts of each individual case.

Q16: What are your views on the two penalty models proposed? We would welcome other ideas on a penalties model for FTC.

25. We do not think that Model 1 is reasonable where the taxpayer has not sought to avoid tax but is held not to have had a reasonable excuse. It effectively criminalises a failure to take reasonable care. Accordingly, we think that Model 2 is the only reasonable approach. While we

recognise that setting penalties will inevitably involve an element of judgment, as noted earlier we are concerned about the proposed level of penalties may be too high and that it may discourage taxpayers from coming forward after the end of the notification period. We suggest that consideration is given to applying suspended penalties where full disclosure is made.

26. We are also concerned that there should not be double penalties. A person should not suffer a tax-based penalty for failure to correct and also suffer a further tax-based penalty under the existing rules for an incorrect return or for failure to notify.

Q17: What are your views on extending the civil enablers penalties to cover the RTC?

27. We do not see how an enabler can become involved in a failure to correct. If he is within the existing enabler rules, the penalty under those rules will already punish the behaviour for which he is responsible.

Q18: Are there any other design considerations you feel we should consider?

28. Not that we can think of.