



Response from ICAS

Tackling offshore tax evasion: A Requirement to Correct

18 October 2016

About ICAS

1. The following submission has been prepared by the ICAS Tax Committee. This Committee, with its five technical sub-Committees, is responsible for putting forward the views of the ICAS tax community, which consists of Chartered Accountants and ICAS Tax Professionals working across the UK and beyond, and it does this with the active input and support of over 60 committee members. The Institute of Chartered Accountants of Scotland ('ICAS') is the world's oldest professional body of accountants and we represent over 21,000 members working across the UK and internationally. Our members work in all fields, predominantly across the private and not for profit sectors.

General comments

2. ICAS welcomes the opportunity to contribute to the consultation "Tackling offshore tax evasion: A Requirement to Correct", issued by HMRC on 24 August 2016.
3. The consultation document notes in paragraphs 3.9 and 3.10 that there have been a number of changes to the penalties applicable to offshore evasion in the last ten years, reflecting the position that using offshore investments and structures to evade tax is unacceptable and should be strongly penalised. However, the resulting increased complexity can reduce the deterrent effect. We agree that this is the case and one of our main concerns with the proposals for Requirement to Correct ('RTC') and the related Failure to Correct penalties ('FTC') is that they add another layer of complexity. This could act as a deterrent to taxpayers who are non-deliberate 'offenders' coming forward, particularly where they are unrepresented. We also consider that there is a significant problem with awareness within this group, which is discussed further below.
4. The consultation document states (paragraph 3.2) that that HMRC *believe "the RTC proposal and increased sanctions for failing to correct....will provide a strong incentive for taxpayers to review their offshore affairs and come forward to put them in order"*. We agree that this is likely but only if all affected taxpayers find out about RTC and FTC (and the latest disclosure facility) and understand how they will affect them. Long term deliberate evaders are likely to be aware of the proposals and of the introduction of data reporting under the Common Reporting Standard ('CRS') and to assess whether to come forward based on their assessment of risk.
5. Consideration needs to be given to effective communication to all those who will be affected by the proposals, particularly those who are unrepresented and are not long term deliberate evaders.
6. Paragraph 3.5 of the consultation says that HMRC's own research into previous disclosure facilities suggests that many taxpayers with offshore compliance issues *"did not identify with "evasion" even where they knew they were not paying the right UK tax. Others may not yet realise they are not paying the right amount of tax. The RTC is intended to motivate such taxpayers to act (including seeking advice where appropriate), and to help agents explain the consequences of non-compliance."* An underlying assumption driving RTC and FTC appears to be that taxpayers have deliberately ignored previous opportunities to come forward. In fact, many are likely (as this paragraph suggests) to have been unaware of the need to come forward or the relevance of the disclosure facilities to them. Groups which might fall into this category include:
 - Returned expatriates, without a background of using advisers, but with overseas income, shares, assets, small foreign pensions etc;
 - Individuals who took advice in the past but do not realise that changes to legislation or their own circumstances mean that it is no longer valid;
 - Individuals inheriting overseas assets and not realising that there is a UK tax issue;
 - Non-resident trustees of trusts with large numbers of non-resident beneficiaries, who did not know that one beneficiary had become UK resident giving rise to a liability.
7. Whilst some of the individuals in the groups mentioned above may suspect that they could have a possible liability, none of them are likely to identify themselves as evaders. It is vital that communications around RTC and FTC are firstly targeted at these groups and secondly highlight issues which these groups are more likely to identify as relevant. The recently released final text of the letter which advisers will be required to issue to some clients (broadly those they have advised on offshore matters) could provide a useful model for a publicity campaign around RTC and FTC. The letter concentrates on trying to get individuals to check that their UK affairs are up to date and to take advice if they are unsure. The header 'If you have money or other assets abroad you could owe tax in the UK' might encourage a non-deliberate or inadvertent offender to continue reading – whereas a

heading which referred to 'evasion' or 'evaders' would not. The letter specifically mentions changes in personal circumstances, inherited overseas assets and out-of-date advice.

8. Possible communication methods were discussed at an ICAS meeting with the HMRC consultation team. These included the possibility of HMRC including a message with tax returns or as a pop-up in the Personal Tax Account – with wording modelled on the client notification letter, as discussed in paragraph 7 above. It would also be helpful if agents and employers were aware of RTC and FTC: HMRC Talking Points webinars, Agent Update, Employers Bulletin and other HMRC newsletters could be used to publicise them.
9. On the assumption that a communication campaign can be devised which succeeds in alerting non-deliberate offenders to the need to correct their offshore non-compliance it is essential that they have access to a mechanism for making disclosures which they can use. Whereas most disclosures through the Lichtenstein Disclosure Facility were from represented taxpayers we understand that HMRC believes that many disclosures through the recently launched digital Worldwide Disclosure Facility ('WDF') will be by unrepresented taxpayers (similar to the position with the facilities for the Crown Dependencies).
10. The consultation document envisages that most RTC disclosures will be through the WDF, using the HMRC digital disclosure service (DDS). Looking at the guidance for WDF/DDS it seems highly unlikely that many unrepresented taxpayers will be able to make a successful disclosure. There may be issues with digital capability for some, but even where this is not the case calculating the unpaid tax and particularly the penalties (given the complexity of the offshore regime, acknowledged in the consultation document) is likely to be impossible for many. For low income taxpayers who may only have a small overseas pension or one overseas bank account and who cannot afford professional advice, disclosure would need to be simpler and via a less formal method than the WDF. The other options mentioned in paragraph 4.20 of the consultation will not assist with this group. Consideration should be given to whether HMRC could have a role to play in referring individuals to tax charities which might be able to assist – without swamping the charities with those who will not qualify for help. HMRC will need to consider how to deal with unrepresented taxpayers who make contact with its call centre looking for assistance.

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?

11. The proposal in paragraph 4.4 of the consultation that the scope of RTC should not be linked to 'particular classes' of taxpayers (eg individuals/businesses) runs the risk that it leads to a lack of clarity in the messages being given in any HMRC guidance on RTC. Looked at overall, it is clear that RTC is primarily relevant to, and targeted at, individuals, non-resident trustees and non-resident landlords. The taxes covered are likely to be IT, CGT and IHT (we comment on this aspect further below). The legislation and subsequent guidance need to reflect this so that those affected are more likely to realise that they fall within the scope.
12. We agree that a definition of 'relevant offshore interests' derived from FA 2007, as set out in paragraphs 4.7 to 4.10 of the consultation, would be most appropriate.
13. Reference to a UK liability, rather than residence in the UK makes sense. There may be enforcement issues in some cases and also additional problems communicating RTC and FTC to non-residents; consideration needs to be given to addressing these.

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

14. It would make sense for RTC to apply only to those taxes currently covered by the offshore penalties regime, so IT, CGT and IHT. The framework for RTC makes use of the existing offshore penalties legislation, so including other taxes would merely add to the complexity.
15. Paragraph 4.13 notes that whilst other taxes would not then be within the scope of RTC, HMRC would aim to facilitate disclosure and will put in place processes to allow taxpayers to make full disclosure of all outstanding UK tax liabilities when meeting their RTC obligations. Given that the main disclosure route for RTC is envisaged to be the WDF, which requires "full disclosure of all

previously undisclosed UK tax liabilities” this should be achievable and would be preferable to complicating the RTC legislation by adding other taxes.

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

16. See our comments in paragraphs 14 and 15 above. We do not believe that other taxes should be included. We understand that ATED has been suggested for inclusion but this is a (relatively) recently introduced tax, not within the offshore penalties framework, and we do not consider that any benefits of including it would outweigh the downside of increased complexity. As paragraph 4.14 of the consultation notes there are other routes for those not captured by RTC.

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?

17. The legislation for RTC is intended to be included in Finance Bill 2017 which is unlikely to receive Royal Assent until July 2017 (at the earliest). The final legislation will not therefore be available until part way through the window. This is unavoidable, but every effort should be made to minimise changes to the legislation after April 2017. On the assumption that a draft will be published on 5 December for consultation it should be possible to make any substantive changes before publication of the Finance Bill in April.

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?

18. There may be problems for earlier years (where the 20 year time limit is in point) because people may have limited/no records – but these problems are not specific to RTC and already exist in cases where irregularities go back many years. The window for RTC may add an additional problem because of the need to gather information and prepare the disclosure by September 2018.

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

19. As noted in our General Comments (see paragraph 10 above) we consider that there needs to be a simpler and less formal method than the WDF for low income taxpayers who may only have a small overseas liability and who cannot afford professional advice. Consideration also needs to be given to the digitally excluded.
20. The WDF imposes a time limit of 90 days, once registered, to make the full disclosure. As has been noted elsewhere this will often not be sufficient time, particularly if an unrepresented taxpayer registers but then realises that they need help and appoints an adviser. A significant part of the 90 days may already have elapsed. Flexibility to extend the time limit would be helpful; HMRC should take a pragmatic approach. A rigidly enforced 90 day time limit could also act as a disincentive to using the WDF if it is perceived that another method would avoid this.

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

21. See our comments in paragraphs 10, 19 and 20 above.

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

22. This seems to be a sensible approach.

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?

23. In general, we would not support changes to the assessing time limits, which exist for good reasons. However, we recognise the problems set out in paragraph 4.22 of the consultation (years going out of date during the correction window) and in this context the proposal to measure the time limits for the requirement from 6 April 2017 seems to be a reasonable approach.

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?

24. We do not support the proposal to extend assessment periods by 5 years. We accept that HMRC will need time to review the CRS data but 5 years is too long – as noted in paragraph 23 above there are good reasons for the assessing time limits.
25. It is essential that HMRC is properly resourced so that it can deal with the CRS data within a reasonable timescale. HMRC staffing levels have been significantly reduced since 2010. This has already had an adverse impact on service levels, particularly for smaller businesses and individuals and (as noted in our briefing paper for the Finance Bill Committee and our Autumn Statement representation) the lack of HMRC resources may undermine measures to tackle tax evasion. CRS will provide information about taxpayers across borders but it is vital that HMRC has adequate resources to be able to analyse the data comprehensively and to follow up where necessary.
26. Rather than a blanket 5 year extension to assessing time limits the underlying problem of inadequate HMRC resources should be addressed.

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

27. We would expect that the correction would be similar in nature to a disclosure, as set out in paragraph 4.24 of the consultation. It is difficult to see why any further information should be necessary. As noted in paragraphs 10 and 19 above we believe that unrepresented taxpayers will already be unable to cope with the disclosure mechanism and the complex offshore penalty regime.
28. We note the proposal that it should be a requirement for taxpayers to provide information about third party enablers. It seems unlikely that most taxpayers would wish to withhold this information, in view of the likely impact on penalties. However, in some cases the taxpayer may no longer have details of any enablers. We do not therefore believe that a formal requirement should be included.

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

29. Additional information powers should not be necessary to support the RTC or CRS. The existing information powers are sufficient.

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

30. Of the three options set out in paragraph 4.30 of the consultation option two would be the best approach. We agree that option one would be undesirable. Option 3 is likely to cause problems if it is simply impossible to provide all the relevant information before the window closes; if discussions with HMRC are ongoing the relevant information may not even be clear by that point. This approach might be open to legal challenge. Where a taxpayer tries to stall (in the context of option 2) this should be reflected in the penalty adjustments.

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

31. We have no comments on this question.

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?

32. We do not agree that there should be a definition of reasonable excuse specific to RTC. The concept of reasonable excuse has a long history and has been the subject of numerous judicial decisions which provide guidance. Whether a taxpayer has a reasonable excuse or not will depend on their personal circumstances, so inevitably there is a subjective element to the test. If HMRC do not agree that a particular taxpayer has a reasonable excuse for failing to correct, the matter would need to be tested at the Tribunal in the normal way. For the reasons set out in paragraphs 6 and 7 above we do

not agree with the suggestion in paragraph 5.8 of the consultation that because of the 'considerable publicity concerning offshore tax' reasonable excuse should in some way be restricted.

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

33. Model 1 appears to fail the test of 'being proportionate'. It cannot be 'proportionate' to have a minimum penalty of 100% for all taxpayers who fail to correct, taking no account of different individual circumstances. For example, it is hard to see that a pensioner who has failed to disclose a small offshore pension because they were unsure that it was taxable in the UK and did not appreciate the relevance of the disclosure facilities or the RTC to their circumstances, should be subject to a minimum penalty of 100% for failing to correct (assuming that they did not have a reasonable excuse). The model does not offer sufficient flexibility to address different taxpayer behaviour and circumstances in a fair way.
34. Model 2 is preferable to Model 1 in that it does give more flexibility to distinguish between taxpayers at the lower end of the spectrum and those who have been deliberate evaders for a number of years (and deliberately failed to correct). It also adopts some familiar features of the existing penalty regime (unprompted and prompted disclosures, for example). It is hard to see why the three categories could not also more closely resemble the categories in the existing penalty regime for inaccuracies. Whilst it is superficially more complex than Model 1 it is unlikely that unrepresented taxpayers would find either model easy to deal with.
35. We consider that the criteria for naming and shaming should be subject to the same safeguards as the existing regime ie tax greater than £25,000 and 'deliberate' behaviour.

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

36. We have no comments on this question.

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

37. We have no comments on this question.