

Association of Accounting Technicians response to HMRC's consultation document "Tackling offshore tax evasion: a requirement to correct"

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1. Introduction

- 1.1. The Association of Accounting Technicians (AAT) is pleased to have the opportunity to respond to HMRC's consultation document "Tackling offshore tax evasion: a requirement to correct" (condoc), released on 24 August 2016.
- 1.2. AAT is submitting this response on behalf of our membership and for the wider public benefit of achieving sound and effective administration of taxes.
- 1.3. AAT has added comment in order to add value or highlight aspects that need to be considered further.
- 1.4. AAT has focussed on the operational elements of the proposals and has provided opinion on the practicalities of implementing the measures outlined.
- 1.5. Furthermore, the comments reflect the potential impact that the proposed changes would have on SMEs and micro-entities, many of which employ AAT members or would be represented by AAT's 4,200 licensed accountants.

2. Executive summary and conclusions

- 2.1. This consultation covers a 'Requirement to Correct' (RTC) obligation that aims to compel those with offshore interests who have yet to put their UK tax affairs in order by September 2018 ahead of the widespread adoption of the Common Reporting Standard (CRS).
- 2.2. It proposes to introduce new legislation requiring any person who has undeclared UK tax liabilities in respect of an offshore interest to correct that situation by disclosing the relevant information to HMRC, with new sanctions for those who 'fail to correct'. The aim is to get taxpayers with issues relating to offshore interests into a compliant position, where they are not already. At the end of the RTC period (September 2018) there would be a single, simplified and tougher set of sanctions for offshore tax evasion.
- 2.3. AAT agrees with the RTC window (3.7, below) and proposals for a single, simplified and tougher set of sanctions for offshore tax evasion (3.13, below).
- 2.4. AAT suggests that Corporation Tax be added to the scope of RTC (3.5, below).
- 2.5. AAT prefers Penalty Model 2 because it provides additional categorisation of penalties to differentiate differing circumstances (3.35, below).
- 2.6. Additionally, AAT provides views on a range of practical issues in Part 3 below.

3. AAT response to the consultation paper “Tackling offshore tax evasion: A Requirement to Correct”

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

- 3.1. AAT considers that ‘gains’ should be included in the definition, so that 4.10 condoc reads “A tax loss relating to income or gains arising from a source in a territory outside the UK.”
- 3.2. The continual addition of layers of legislation has increased complexity in the sanctions applicable to offshore evasion (3.10, condoc), which can reduce the deterrent effect of the penalties.
- 3.3. Therefore consolidation and simplification of existing legislation is to be welcomed.

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

- 3.4. The taxes proposed to be within the scope of RTC are Income Tax (IT), Capital Gains Tax (CGT) and Inheritance Tax (IHT; for offshore penalties from April 2016). To include other taxes in addition to those covered by existing offshore penalties would risk increasing the complexity of the RTC.
- 3.5. However, it would seem reasonable to expect Corporation Tax to be included in instances of failure by UK companies to disclose their overseas profits or gains.

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

- 3.6. Please see 3.5 (above).

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?

- 3.7. Given that the covering legislation is proposed for Finance Bill 2017 and the end date of 30 September 2018 corresponds with the date by which all countries have to commit to the Common Reporting Standard (CRS), the window is reasonable. It is of sufficient duration to give taxpayers time to review and assess their affairs and address any issues identified.

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?

- 3.8. It is accepted that within the period to 30 September 2018 HMRC should be entitled to expect the RTC to cover all instances where there are outstanding UK tax liabilities or obligations that relate to offshore interests on, or before, April 2017.

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

- 3.9. While supporting the proposed approach it is anticipated that a number of taxpayers will seek the cover of the Contractual Disclosure Facility rather than disclosure through the Digital Disclosure Portal.

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

- 3.10. HMRC should engage upon a campaign supported by widespread advertising to ensure that this matter is given maximum coverage.
- 3.11. In addition it is recommended that HMRC clarify its prosecution policy towards disclosures made during the correction window.

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

- 3.12. The principle that a correction should follow the assessment periods currently set out in law is entirely reasonable.

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?

- 3.13. AAT acknowledges HMRC's concern that some taxpayers may delay in order to allow years to pass out of assessment by waiting to the end of the window to disclose. AAT also notes HMRC's proposals in condoc 4.22 to "encourage earlier disclosure and settlement of any issues with the result that anyone coming forward at the end of the window would not benefit from having waited" by "measuring the assessment time limits for the requirement from the date at which the window opens (6 April 2017) and fix it at that point". AAT considers that this is inconsistent with the principle expressed in 4.21 condoc "The principle we propose is that a correction should follow the assessment periods as currently set out in law". AAT also considers that wider considerations, as listed in paragraph 3.14 below, needs to be examined and other approaches reviewed as suggested in paragraph 3.15 below.
- 3.14. The wider considerations referred to in paragraph 3.13 are as follows:
- The obligations of the requirement to comply with RTC are stated in condoc 4.20 "we would expect the taxpayer or their representative to correct the inaccuracy or failure by disclosing any outstanding tax, interest and relevant penalties due. HMRC expects the majority of cases meeting their obligation under the RTC to be via a disclosure either through the digital disclosure portal, or via another route such as the Contractual Disclosure Facility. (CDF)"
 - The practical experience of AAT members is that the time requirement to thoroughly review and prepare a final offer as envisaged in the bullet point directly above is over one year in a complex case. The agent would need to be preparing the scope of the disclosure by September 2017.
 - Again in condoc 4.20 "HMRC expect the majority of cases meeting their obligation under the RTC to be via a disclosure through the digital disclosure portal".
 - AAT considers that the digital disclosure portal is inappropriate for serious tax evasion cases.
 - AAT considers that taxpayers who delay disclosure, in the context of question 9, display the behaviour of deliberate action where the time limit for assessment is 20 years.
 - However, AAT considers that evasion going back 20 years is so serious that HMRC would review appropriateness for criminal prosecution with CDF being offered at the discretion of HMRC.
- 3.15. Any experienced representative would approach HMRC to seek CDF at the commencement of the preliminary overview of a case. CDF is not a guarantee that is available at settlement. An important stage of CDF is the outline to HMRC within 60 days of the HMRC CDF letter of all sources of income and gains to be covered by CDF. AAT considers that HMRC would then have the notice and capabilities of making protective estimated assessments to cover the oldest years about to pass out of the time limit.

- 3.16. While in 2.9 (condoc) the RTC initiative is described as “a final opportunity for taxpayers to put their affairs in order before they are subject to significantly tougher penalties” and “after September 2018, any person who is found to have failed to have corrected their affairs will be subject to a new set of sanctions for this “Failure to Correct (FTC)” condoc 4.2, it would appear from the statement in condoc 4.22 (quoted at 3.13 above) that a separate penalty regime will apply to disclosures after 5 April 2018 (the end of the tax year commencing 6 April 2017).
- 3.17. Although, it is intended to introduce the proposals in Finance Bill 2017, fixing the point at which the window opens to 6 April 2017 gives complex overseas structures little time to achieve full and complete settlement.

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?

- 3.18. The statement “We would expect the (RTC) ‘correction’ to cover any outstanding UK tax liabilities that are ‘in date’ for assessment under the normal rules for tax assessment..... 20 years where the tax loss was brought about deliberately” (4.21, condoc) contrasts with the subsequent statement that “We are considering a one off extension (of 5 years) to the assessment periods for tax and penalties following the RTC to allow HMRC to review the Automatic Exchange of Information data and challenge those who have not corrected” (4.23, condoc) and this results in an assessing period of 25 years. AAT considers that extending the current maximum period of assessment, which has been law for very many years, will discourage what the RTC is trying to achieve, which is to encourage taxpayers with offshore interests to disclose. The exchequer is likely to benefit for many years after offshore evaders are brought to account.
- 3.19. Nevertheless, HMRC will also have the ongoing tougher penalties promised in condoc 3.2 for those who do not disclose by 30 September 2018. “Those who do not put their affairs in order will face the tougher failure to correct sanctions for any existing non-compliance and could also face the significantly (new) tougher sanctions for any offences in subsequent years.”

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

- 3.20. The proposed offer to include all tax, interest and penalties should be supported by evidence, and also requirements for statements of assets, certificates of bank accounts opened during the period of correction with a certificate of full disclosure. With regards to HMRC considerations expressed in condoc 4.27 “requiring the taxpayer to provide information about any third party that has enabled or facilitated their offshore non-compliance”, please see AAT’s opinion in paragraph 3.26 below, although HMRC could require this as a condition of contract.

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

- 3.21. AAT notes that HMRC is considering whether it might need any new information powers or changes to existing powers to support discovery assessments relating to corrections made under the RTC or the use of the CRS data. (Condoc 4.29)
- 3.22. AAT considers that the current very wide Information and Inspection Powers in Schedule 36 FA 2008 are sufficient to make any further checks needed following receipt of CRS data. These powers enable HMRC to require information or a document from the taxpayer or a third party if reasonably required “for the purpose of checking the taxpayer’s tax position”. There are exceptions to documents under legal professional privilege (paragraph 23) and certain audit information (paragraph 24) and tax adviser’s property (paragraph 25) although paragraph 26 limits the scope to which the latter applies. See paragraph 3.26 below regarding enablers.

- 3.23. Current legislation is adequate to support discovery assessments relating to corrections made under the RTC or the use of the CRS. As mentioned earlier (3.16, above) failure to make settlement before 30 September 2018 will expose taxpayers to the proposed new set of severe sanctions. Corrections made before 30 September 2018, but discovered as part of a later review of CRS data to be inaccurate, would be regarded as a very serious matter especially where supported by an incorrect statement of assets and certificate of full disclosure, possibly making the taxpayer liable to prosecution. Also, CDF would be appropriate in cases which go back 20 years. Under CDF, the taxpayer is guaranteed immunity from prosecution provided all sources are completely disclosed. The CDF agreement makes clear in writing, agreed by the taxpayer, that failure to disclose any taxable income or gains renders the taxpayer liable to prosecution.
- 3.24. Currently discovery assessments can be made whenever new information is received that there has been a failure to disclose income or gains within the limits mentioned in paragraph 3.12 above. Even where a time limit may be exceeded after 30 September 2018, AAT would not expect the taxpayer to refuse to revise a contract settlement for the years covered by the settlement, if the threat of criminal prosecution was an alternative.
- 3.25. Current legislation does not enable HMRC to require a taxpayer to provide information in respect of a third party that has enabled or facilitated the taxpayer's non-compliance (as suggested in 4.27, condoc) because Schedule 36 FA 2008 (Information and Inspection Powers) relates to the purpose of "checking the taxpayer's tax position". The power to obtain information from a third party (Schedule 36, paragraph 2) also relates to checking the tax position of a taxpayer, not the penalty position of an enabler.

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

- 3.26. It is noted that HMRC recognises that situations will occur where complexities in relation to particular taxpayers meeting RTC requirements to settle before the end of the window, particularly those taxpayers who are under enquiry during the requirement window (April 2017- September 2018). (condoc 4.30)
- 3.27. There will also be complex enquiries that will not be able to reach settlement, perhaps due to various sources under enquiry and where information is required from third parties where it would be reasonable to extend the window without the imposition of the FTC penalties.
- 3.28. To address the potential issue of taxpayers who consider there is an incentive to stall discussions, HMRC will need to adopt a strict approach and force the settlement of the outstanding liabilities before the requirement window closes if it considers that a taxpayer is stalling discussions.
- 3.29. As part of such an approach it is to be expected HMRC will need to raise 'protective' assessments to protect the revenue when a year is likely to go 'out of date'.

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

- 3.30. In the most serious of cases a CDF should be in place where the taxpayer would have to outline sources of undeclared income within the 60 day period of that procedure to avoid the possibility of criminal prosecution.
- 3.31. Under such circumstances it would normal for HMRC to make an appropriate 'protective' assessment.

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?

- 3.32. Current legislation on reasonable excuse, as explained by past Tribunal decisions, is satisfactory and does not need amending for not having met the obligations of the RTC.

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

- 3.33. AAT prefers model 2 because it is a more flexible option.
- 3.34. It is recognised that model 1 would be simpler to administer but not all taxpayers and circumstances will be the same and as a result the rigidity of model 1 will not always be appropriate.
- 3.35. Model 2 lacks the simplicity of model 1, but is more flexible in that it provides for some additional categorisation of penalties to differentiate cases more clearly.
- 3.36. AAT agrees with the HMRC view that there should be a role for incentivising unprompted disclosure from the taxpayer, charging lower penalties if the taxpayer makes a voluntarily disclosure about their FTC, albeit set higher than current levels.

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

- 3.37. The civil enabler penalties should be extended to cover situations in which an enabler has helped the taxpayer circumvent the RTC.

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

- 3.38. AAT has no further comments on design considerations.

4. About AAT

- 4.1. AAT is a professional accountancy body with approximately 50,000 full and fellow members and 80,000 student and affiliate members worldwide. Of the full and fellow members, there are over 4,200 licensed accountants who provide accountancy and taxation services to individuals, not-for-profit organisations and the full range of business types.
- 4.2. AAT is a registered charity whose objectives are to advance public education and promote the study of the practice, theory and techniques of accountancy and the prevention of crime and promotion of the sound administration of the law.

5. Further information

If you have any questions or would like to discuss any of the points in more detail then please contact Aleem Islan, AAT Technical Consultation Manager, at:

E-mail: consultation@aat.org.uk Telephone: 020 7397 3088

Association of Accounting Technicians
140 Aldersgate Street
London
EC1A 4HY