



REQUIREMENT TO CORRECT IN RELATION TO OFFSHORE MATTERS

Under the new Requirement to Correct regime (the RTC) punitive penalties apply where a person has offshore undeclared tax liabilities at the end of the 2016/17 tax year and fails to correct them between 6 April 2017 and 30 September 2018 (the RTC period). Following the introduction of the Common Reporting Standard, HMRC now receives increasing information about the offshore affairs of UK taxpayers and the RTC gives them additional powers to crack down on failure to comply with UK tax obligations.

The RTC applies to income tax, capital gains tax and inheritance tax. Non-compliance includes the failure to notify chargeability to tax, failure to deliver a return and delivering an inaccurate document (e.g. tax return) to HMRC. It is important to note that the RTC can apply to wholly innocent mistakes, or to situations where advice was taken but HMRC take a different view (and not just deliberate non-compliance).

The RTC applies where the tax at stake relates to income arising, assets situated and activities carried out wholly or mainly outside the UK. It also applies where income, assets or the proceeds from selling an asset have been transferred offshore before 5 April 2017.

WHAT ARE THE PENALTIES?

If a taxpayer fails to correct their tax position by 30 September 2018, they will be liable to the following penalties:

- 100%-200% of the tax due (depending on the level and quality of disclosure to and co-operation with HMRC) – the “failure to correct penalty”;
- an additional offshore asset moves penalty of 50% of the amount of the failure to correct penalty if HMRC can show that assets or funds have been moved to attempt to avoid the RTC; and
- where the tax at stake exceeds £25,000 in any tax year and the taxpayer becomes aware of an issue during the RTC period but fails to correct this:
 - HMRC can “name and shame” the taxpayer, publishing their name, address and nature of business; and
 - an additional asset based penalty of up to 10% of the value of assets connected with the failure to correct.

The period of assessment can go back as far as 20 years in the case of deliberate errors and there is an extension of assessment limits with those due to expire between 6 April 2017 and 5 April 2021 now running until 5 April 2021.

WHAT DEFENCE IS AVAILABLE AGAINST THE PENALTIES?

A penalty under the RTC does not apply if the taxpayer has a “reasonable excuse” for the offshore tax non-compliance.

Unfortunately this is defined narrowly. Even taking professional advice for offshore planning could fail to provide a taxpayer with a reasonable excuse if it falls within the category of “disqualified advice”.

Included in the definition of disqualified advice is advice relating to “avoidance arrangements”. The HMRC guidance on the RTC indicates that a wide view is taken of what constitutes avoidance arrangements and this can include advice provided on offshore structures and how to mitigate UK tax in respect of them. The guidance also suggests that HMRC could challenge complex offshore structuring, particularly where this has been based on the interpretation of anti-avoidance provisions and highly technical analysis or defences that rely on commerciality. However, advice on a taxpayer’s domicile position does not appear to fall within the scope of disqualified advice provided that it is based on a taxpayer’s full and accurate circumstances.

HOW DOES THIS AFFECT YOU?

The RTC will only affect you if you have offshore interests or had them up to and including 5 April 2017. If you have obtained professional advice on mitigating UK tax in respect of offshore interests, you should be aware that you would not necessarily be able to rely on that advice as a defence against the RTC penalties if HMRC were to challenge the structure successfully.

We recommend that you review your UK tax affairs before 30 September 2018 to ensure that you are up to date with your returns. This includes considering whether there have been any inadvertent tax charges that may have arisen in relation to your offshore affairs, e.g. possible tainting of clean capital or addition of UK assets to an offshore trust. In this situation we can approach HMRC before 30 September 2018 to disclose the liability and avoid the RTC altogether with a penalty as low as 0% applying instead. It is possible to have an extension of up to 90 days from the 30 September 2018 deadline by registering an intention to make a disclosure under HMRC’s Worldwide Disclosure Facility before 30 September, with the required information being supplied within the next 90 days.

It is also important to be aware that circumstances change as do the tax rules, so advice that was accurate some years ago may be out of date now, resulting in it being disqualified for RTC purposes. Consequently the position should be reviewed to determine if a correction before 30 September 2018 is required.

It is possible to secure a reasonable excuse defence for offshore planning you have undertaken by obtaining a second opinion from separate advisers on the structuring before 30 September 2018. Indeed, the HMRC guidance recommends this where complex offshore structuring has been undertaken.

If there is any doubt as to whether a tax charge should apply or not, a final option is to make a disclosure to HMRC before 30 September 2018, even if this is just a disclosure to state why you believe no tax is due. This will avoid the punitive RTC penalties applying, even if HMRC subsequently disagrees with your position. However, making such a disclosure will involve an element of judgement and an awareness of possible risk in alerting HMRC to what was likely to have been perfectly legitimate planning undertaken in relation to your offshore affairs.



KEY CONTACT

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