CIOT and ATT Requirement to Correct Webinar – 18 July 2018

Questions and Answers

These Q&As have been produced from the questions that were raised by CIOT and ATT members before and during our webinar which took place on 18 July 2018 on the Requirement to Correct Offshore Tax Non-Compliance (RTC) in Schedule 18 Finance (No 2) Act 2017. We recommend that you read these Q&As in conjunction with watching the webinar which was recorded and can be viewed at the following link for 12 months - http://lexisauditorium.com/stage.aspx?c=5123dba9-0f52-4759-bf1d-fbf62ea9037b.

Disclaimer

No responsibility can be accepted by the CIOT or ATT for the consequences of any action taken or refrained from as a result of these Q&As. The answers provided are based on the CIOT and ATT's understanding of the legislation and how HMRC will apply the legislation at the time of writing [July 2018]. We recommend that if you are in any doubt about whether your client should make a disclosure under the RTC by 30 September 2018 that you seek specialist professional advice and /or contact HMRC at consult.nosafehavens@hmrc.gsi.gov.uk.

30 September 2018 deadline

1. Is 30 September 2018 a 'hard' deadline?

   A: HMRC's updated guidance covers what you must do to avoid a Failure to Correct penalty if you are making a disclosure close to the 30 September 2018 deadline – see examples 13A – 13D at https://www.gov.uk/guidance/requirement-to-correct-tax-due-on-offshore-assets

2. Will HMRC have the resources to deal with what is likely to be a large number of notifications and disclosures between now and 30 September 2018?

   A: Yes, HMRC have said that they are committing additional resources to deal with the likely increase.

RTC Guidance – future tranches

3. Will there be any further updates to HMRC's guidance?

   A: We understand that HMRC may make some minor changes to the guidance in the coming weeks.

Requirement to Correct – disclosure

4. Can HMRC share the email address to send a narrative for disclosure?

   A: If you wish to submit a narrative alongside the WDF disclosure, you should send it by email to ocu.hmrc@hmrc.gsi.gov.uk. It must be sent at the same time that you submit your online disclosure and you must quote your Disclosure Reference Number in the email title.

5. Do HMRC have a *de minimis* approach to issues requiring correction? What if there has been some omitted income but no further tax is owed, for example?

   A: There is no *de minimis* but if no tax is due then usually no penalty can apply as the Failure to Correct penalty is based on the Potential Lost Revenue (PLR) and 200% of nil is nil.

6. HMRC say they will advise on the "intended course of action within 90 days of acknowledgement". Will this constitute an acceptance or refusal of the disclosure?

   A: When the taxpayer makes their disclosure (in other words their 'offer' in settlement), HMRC will, within 90 days, either accept the offer or inform the taxpayer of an alternative course of action (i.e. this may be that HMRC require some further information, have further queries or in extreme cases they may open an enquiry).

7. Does the RTC have a 'clearance' facility whereby HMRC will confirm that a taxpayer's offshore structure etc is compliant?

   A: No.

8. What should the taxpayer do if they have not kept documentation and are having difficulty obtaining information from banks / third parties - particularly problematic where the non-compliance goes back many years, and records have been destroyed and memories have faded. How will HMRC look on these cases when considering what penalties to apply and the reductions available?
   And another similar question:
   My client's disclosure goes as far back as 2002 which relates to the deposit of a large amount of money into an offshore account. Our client has told us that this relates to the sale of a business asset, but we are unable to gather any documents to support this (as no providers hold information that far back), therefore we are unsure of the best way to proceed, particularly in respect of the level of penalty that will be applied.

   A: As in any case where a taxpayer has lost his records or cannot obtain them they should make a disclosure to the best of their knowledge and judgement. They can use estimated figures but should explain how they have been arrived at. HMRC will decide whether to accept the disclosure and if necessary ask further questions. If penalties are due they will be

calculated in line with normal processes and will take account of the helping, telling and giving that has been provided by the taxpayer.

9. Can a full disclosure simply be made by letter to the normal self-assessment office by 30 September 2018 and are there any negative consequences?

   A: Yes, a disclosure can be made in this way. However, it is recommended that you use the Worldwide Disclosure Facility (WDF) if possible as this will mean that your notification will go directly to the HMRC team handling disclosures.

10. How do you make a disclosure relating to a tax year outside of the four years listed on the Digital Disclosure Service (DDS)?
    And another similar question:
    Why does the DDS appear to limit disclosures to the 4 years ended 2016/17?

    A: if you need to make a disclosure covering more than 4 years, the relevant boxes will be automatically generated by the DDS once you have answered the questions presented to you in respect of your client's failure / error and their behaviour (failure to take reasonable care / deliberate). See the WDF Guidance for more information - https://www.gov.uk/guidance/worldwide-disclosure-facility-make-a-disclosure#circumstances-where-a-higher-penalty-may-apply.

11. For clients who are currently under enquiry by HMRC or have historic unresolved tax issues, there is a risk that if those matters are subsequently settled after 30 September 2018 and there is a tax liability, then if they involve offshore matters HMRC will seek to apply the FTC penalty. Should tax advisers with clients under enquiry in respect of offshore matters be approaching HMRC now to clarify the penalty exposure in the event of there being a liability and discuss what further information HMRC might require? There is less than 12 weeks left until 30 September 2018 and what assurance can HMRC give that Inspectors will deal with such approaches in a timely manner?

    A: We understand that HMRC are encouraging caseworkers to contact taxpayers where there is an ongoing enquiry to make the taxpayer aware of the RTC and where appropriate set out what information HMRC consider is the relevant information. In any case where there is an ongoing enquiry and the taxpayer supplies all of the information that HMRC request this will be taken into account in considering whether the taxpayer has a reasonable excuse for not correcting should it ultimately transpire that a liability exists. Obviously, every case will turn on its own facts. If you have clients that are under enquiry and you are aware of the need to make a correction it is recommended that you contact the caseworker as soon as possible to discuss how this should be done. You should also remember that under the additional RTC guidance issued on 11 July 2018 a taxpayer who is under enquiry can notify the caseworker of the need to make a correction by 30 September 2018 and then have a further 60 days to supply the required information.

12. If you have registered for the WDF and then make an application to the Non Statutory Clearance Facility over a technical point, if the outcome of HMRC's response is that no liability arises so disclosure is no longer required, how should you notify HMRC that no disclosure is needed? Is there a particular process?

    A: In this situation, you should telephone the Helpdesk (the number is in the WDF Guidance see link above) and tell them you are withdrawing your disclosure.

13. Is it correct that disclosure can only be made under Code of Practice 9 (COP9) rather than also Code of Practice 8 (COP8) (for non-deliberate behaviour) and if COP8 is available, is there an extension to the 30 September deadline?

    A: There are three main ways you can make a disclosure – by using HMRC's Digital Disclosure Service as part of the WDF, by using the CDF (COP9) or by telling an officer in the course of an enquiry into your affairs. 'Enquiry' is used in a wide sense to mean any ongoing investigation by HMRC so includes COP8 enquiries.

14. How does the RTC regime interact with the charge on outstanding disguised remuneration loans, known as the 2019 loan charge, which was introduced in the Finance (No 2) Act 2017.

    A: There is no direct interaction with the loan charge itself as it can't arise before April 2019 and the RTC covers inaccuracies for 2015/16 and earlier. However, there will be an interaction if the disguised remuneration loans concerned involve "offshore non-compliance" relating to Income Tax, Capital Gains Tax or Inheritance Tax during those years as defined in para 7 Schedule 18 F (No 2) A 2017.

15. What obligation do employers have with respect to this requirement? Particularly, where we are 'hosting' overseas employees as secondees and assist with facilitating their tax returns?

    A: The RTC applies only to Income Tax, Capital Gains Tax and Inheritance Tax and to the returns specified at paragraphs 8 (3) and (4) of the legislation. It does not apply to PAYE returns as they are not listed. Therefore, any undisclosed PAYE liabilities relating to overseas employees do not have to be corrected under the RTC. Where the employees themselves have any offshore non-compliance to correct then they should do this using either the WDF or any other of the suggested means of disclosure (see HMRC's guidance) by 30 September 2018. It will ultimately be their responsibility to do this, but as their employer you may decide to assist / support them in doing so.

16. If there are say 20 years of undeclared rental income, will HMRC accept that losses for out of date years can be accepted in the same way that profits will be taxed for out of date years?

    A: The usual consequential loss claim rules will apply.

RTC – specific cases being seen in practice

17. What is HMRC's policy regarding open enquiries and the RTC – in particular the activities carried out by WMBC/High Net Wealth Unit in this area? The WMBC are sending letters to the taxpayers that they are enquiring into, outlining what information they require in order to be 'told' about an issue. This would normally be welcome as it provides a level of certainty. However, in some instances, the level of information required goes far beyond the information required by the RTC guidance – in one case, a list of over 70 queries relating to the same issue. Therefore, will HMRC release guidance on what 'told' means – is it akin to the information required to prevent discovery for example? Are these letters from WMBC binding, do they view them as binding? What if person A gets a letter detailing a long list of information required and person B doesn't and they both just supply the information required by the guidance? Will they be treated the same?

    A: We understand that HMRC are contacting taxpayers where there is an ongoing enquiry to make the taxpayer aware of the RTC and where appropriate set out what information HMRC consider is the relevant information (see para 13 Schedule 18). In any case where there is an ongoing enquiry and the taxpayer supplies all of the information that HMRC request, our understanding is that HMRC will take this into account in considering whether the taxpayer has a reasonable excuse for not correcting should it ultimately transpire that a liability exists. Obviously, every case will turn on its own facts.

    In some cases, we know that HMRC caseworkers have gone further and explicitly stated that if specified information is supplied they will accept that all relevant information has been supplied and FTC penalties will not apply. HMRC's view is that this gives the taxpayer the opportunity to obtain certainty on the matter. It is open for the taxpayer to disagree and to supply none or only some of the information requested but if they do that they will not have the certainty they might otherwise have.

    If information that has already been supplied is being requested, we would suggest that you should refer the caseworker to what has already been provided. As stated above the taxpayer can obtain certainty but may also take the view that they have nothing to worry about as there is no additional tax; or even if there is they have already supplied sufficient information to meet the test in the RTC legislation (effectively to supply the relevant information) but that will be based on their view and does not provide the same level of certainty.

18. RTC letters are being sent where there is an open domicile enquiry asking for the same information that's in some cases already been provided during the enquiry. Another complaint about these letters is that they are setting out 2 options to avoid FTC penalties (either Option A accept UK domicile status and provide the figures by 30 September, or Option B state that no additional tax is due and provide calculations). It is unclear why, if the

taxpayer is already cooperating with an enquiry and believes that there is no uncertainty over their status, they should be put to the expense of Option B. In the event that a FTC penalty is imposed, it appears they may have a reasonable excuse (see Example 9 of the guidance) but the letter does not mention reasonable excuse at all.

And another very similar question:

I have two clients with long running domicile enquires who have been sent letters by HMRC warning of the new RTC legislation and saying they have an option, in outline, of:

a. Removing claims to remittance basis for the last 4, 6 or 20 years depending on behaviour, or
b. Advising that it is thought that no additional tax is due but providing extensive details which have already been provided as part of the domicile enquiry, e.g. the first question being date of birth!

These are clearly very standard letters and I'm sure have been sent to other taxpayers with outstanding domicile enquiries.

A: See answer above to Q17.

19. What is the RTC position with regard to taxpayers claiming to be non-UK domiciled who claimed the remittance basis in 2016/17 or earlier years and who honestly continue to believe they are not UK domiciled in law but whose status is challenged by HMRC on enquiry after 30th September 2018? What sort of information would HMRC expect to receive by 30th September 2018 in order to protect the taxpayer from RTC penalties in the event that a subsequent HMRC enquiry challenging domicile is conceded by the taxpayer for tax return purposes - often only to limit costs on otherwise limitless correspondence, not because they actually concede their domicile status in law?

A: See answer to Q17 above with regard to what information to provide before 30 September 2018. The reason for conceding would not appear to be relevant.

20. HMRC are sending letters to taxpayers who've made a claim for a relief or exemption such as Overseas Workday Relief, or Foreign Service Relief, reminding them about the RTC legislation and of the associated penalties if any liabilities are found to be due that have not been reported. Whilst the claims for relief/exemption do relate to offshore activities and on that basis are in principle covered by RTC, is it correct that making this kind of a claim would constitute an 'inaccuracy' such that if HMRC deny the claim in whole or in part and therefore tax is due, a FTC correct penalty would apply?

A: Yes – because Schedule 18 paragraph 8 includes:

> "Tax non-compliance" means any of the following—……
> (c) delivering to HMRC a return or other document which … contains an inaccuracy which amounts to, or leads to—
> (i) an understatement of a liability to tax……

Offshore trusts - some need to make disclosures and we are considering the time period that will need to be covered under the RTC legislation. These are all cases that fall within the Failure to Notify provisions. Clearly all years back to 2009/10 are open years under the RTC but HMRC can potentially treat all years back to 1996/97 as open years if they consider that the failure occurred as a result of negligent conduct of the taxpayer or any person acting on his behalf. There is no definition as such of negligence and our trust cases typically have the scenario where the trustees have overlooked a UK source of income or have not appreciated that UK beneficiaries have removed the disregarded income exemption. In most cases no tax advice had been sought by the trustees specifically on the matter of the taxation of UK income. Are you of the view that HMRC would typically regard the failure as negligent conduct in such cases (albeit with no intent)?

A: This will depend on the specific facts of each case.

Offshore Trusts (cont'd) - under the general rules for assessment time limits (e.g. in respect of an incorrect tax return) such conduct would have been regarded as "careless" (6 year limit) as it was not "deliberate (20 year limit). Under the Failure to Notify rules the only specification is "negligent". Do HMRC take the view that negligence and carelessness are effectively the same thing? For many trustees producing records back to 1996 can be extremely difficult, particularly where there have been changes in trustees and investment managers over that period. There are also significant professional costs involved in resolving this. My understanding is that HMRC will take a firm line and seek to assess the full 20 years but any comments on this point would be much appreciated.

A: HMRC will apply its normal interpretation of 'careless' 'negligent' etc. and nothing in the RTC changes that interpretation.

21. A client received a HMRC letter saying they have information about income or gains in the USA which asks the client to complete a Certificate of Tax Position. If all income has been declared on their Tax Return does this need completing?

A: It is not mandatory to complete the Certificate of Tax Position. As it is a prosecutable document you should think carefully about advising your client to sign it. In any event before responding to the letter, it would be sensible to check with your client whether there is any possibility that there has been an error or omission in their filed tax returns. It would not be advisable simply to ignore the letter. HMRC acknowledge that a response to them by letter (rather than a signed 'Certificate of Tax Position') is perfectly acceptable.

RTC – extension of time limits

22. Does the extension of time limit impact on the limitation of assessing ability of a deceased person?

A: We have referred this question to HMRC.

RTC – penalties

23. What penalty regime applies in respect of disclosures made via the WDF, paying attention to the fact that the RTC period will soon be coming to an end?

    A: Normal penalty rules apply as laid out in HMRC's factsheets, guidance etc. Please also refer to the webinar slides for more detail about which penalty regime applies for which tax years.

RTC – reasonable excuse

24. What is the position where:
    - a taxpayer has in the past relied on advice by an 'interested person' in relation to an offshore matter and submitted a return in accordance with the advice;
    - there is an ongoing tax-technical dispute with HMRC; and
    - the dispute is resolved in the future which means there has been a non-deliberate error in the return?

    So, the issue is not non-disclosure, it is the exclusion of advice by an 'interested person' in establishing a reasonable excuse, combined with the fact that as of today it is unclear if a correction will ever need to be made.

    A: See answer to Q17 above, regarding what information would need to be provided to HMRC by 30 September 2018 to provide certainty against exposure to a FTC penalty. If all relevant information has been provided there should be no risk of a FTC penalty. Para 23(3) Schedule 18 F (No 2) A 2017 deals with 'disqualified advice' from an 'interested person' and this is covered in more detail in HMRC's RTC Guidance.

25. Will a reasonable excuse be accepted when a taxpayer has relied on HMRC guidance or a decision of an HMRC officer?

    A: Obviously each case will depend on its own facts, but it is likely that in this scenario a reasonable excuse would be accepted. Note that in the context of avoidance arrangements and its relevance to whether advice is 'disqualified advice', the legislation specifically excludes arrangements that accord with 'established practice' from the definition of 'avoidance arrangements' (see para 23(7)(a) Schedule 18 F (No 2) A 2017, so that the advice will not be automatically disqualified. HMRC's guidance also specifically covers this issue (see under 'Definition of an Interested Person'.

Worldwide Disclosure Facility

26. We understand the WDF will come to an end on 30 September 2018. What will happen afterwards?

    A: The WDF does not end on 30 September 2018; it continues indefinitely but has no special terms with everyone being dealt with in line with statute (except that HMRC has stated that anyone using the WDF will not have their details published under the Publishing Details of Deliberate Tax Defaulters legislation (PDDD). What changes on 1 October 2018 is the law applies higher penalties so anyone entering the WDF after 30 September 2018 will be expected to self-assess penalties using Failure to Correct (FTC) penalties.

Failure to Correct (FTC) Penalty

27. Who makes the decision as to whether FTC applies?

    A: It will be a question of fact. If HMRC find offshore tax non-compliance after 30 September 2018 that was committed before 6 April 2017 and was not corrected by 30 September 2018 then prima facie the FTC penalties will apply.

28. What internal mechanisms are in place to ensure the FTC penalty is applied consistently?

    A: HMRC staff are expected to follow published guidance and the Compliance Handbook will be updated to cover FTC penalties.

29. What are the mitigating factors bringing a penalty down from 200% to 100%?

    A: This is covered in the updated guidance – broadly it follows the existing rules with a 30/40/30 split for telling, helping and giving but if the person does not come forward voluntarily the penalty will not be reduced below 150%.

30. In practical terms when do you think we will see the asset based penalty applied?

    A: It is expected that asset based penalties will be imposed soon both in 'traditional (i.e. non FTC) cases' and in conjunction with the FTC penalties.

31. How does the 200% penalty work with historical penalties? Is there Double Jeopardy?

    A: No – HMRC will only charge one of the penalties – the higher of the two and they expect that to be the FTC penalty in all but exceptional cases.