

TAXATION UPDATE



The New Disclosure Opportunity (“NDO”)

The New Disclosure Opportunity (NDO) for people with unpaid UK tax connected to a bank account offshore will run from the autumn of 2009 until March 2010, HM Revenue & Customs (HMRC) has confirmed.

In 2007, HMRC announced the introduction of an Offshore Disclosure Facility (ODF) under which taxpayers with undisclosed overseas income and accounts had a limited period within which they could disclose details of this income and these accounts - and be subject to a much lower penalty (10%) than would normally be applied. The ODF provided HMRC with a significant amount of information and tax!

The NDO will give offshore account holders one final opportunity to disclose these accounts, and put their affairs in order. It will commence in the autumn of 2009 and run through to March 2010. A penalty of 10% is to be offered for full disclosure in cases where there was 'no previous opportunity' but it will be higher in other cases. The penalty is lower than many expected but given the relative success of the previous disclosure opportunity HMRC expects that a penalty of only 10% will encourage taxpayers to come forward.

Tax payers with accounts at HSBC, HBOS, LloydsTSB, RBS, NatWest and Barclays are unlikely to be covered by the NDO. This is because such taxpayers were given the chance to make a disclosure under the ODF and the opportunity of a 10% penalty may have gone for these people.

Taxpayers who don't make use of the NDO could, if subsequently investigated by HMRC, find themselves in the new penalty regime. The new penalty regime applies to return periods beginning on or after 1 April 2008 with a filing date on or after 1 April 2009. Under this new regime taxpayers who have deliberately concealed omitted business takings or income (either through the use of offshore accounts or other methods) are likely to face a penalty of between 50% and 100%. In this context the 10% flat rate penalty under the NDO clearly provides a significant incentive for taxpayers to make a disclosure.

If people do not disclose, HMRC state:

- The NDO is a final opportunity to disclose in advantageous circumstances – there will not be another one.
- Anyone who has – or thinks they have – unpaid tax connected to an offshore account, should not wait for a further opportunity – it still makes sense to come forward now.
- They face the likelihood of HMRC contacting them after the disclosure window has closed. If there are unpaid liabilities, this will almost certainly mean a higher penalty at the very least.
- HMRC have plans to risk assess all the information they receive and they will identify people who they believe have undeclared liabilities but who

have not disclosed through NDO.

- They will use their enquiry and inspection powers to approach taxpayers in this group and they will vigorously pursue all outstanding liabilities.

HMRC have while the NDO has been on the drawing board been taking the opportunity to extend the number of financial institutions required to disclose to them the names of individuals with UK addresses holding offshore bank accounts. So far in addition to those banks named above notices have been served on four as yet unnamed banks who are required to make the necessary disclosures; further information on HMRC's background work is given below.

If you think the NDO may be relevant to you, or you know someone who may benefit from the lower penalty on offer, please contact us as soon as possible.

Further background

On 30 March 2009 HMRC obtained permission to serve disclosure notices on four as yet unnamed banks as mentioned above. Each notice will require the bank to hand over data on its customers who have UK addresses but non-UK bank accounts. This is the first step in extending HMRC's crackdown (which previously involved just five major UK banks) to all 500 or so UK banks and building societies and foreign banks operating in the UK. Allied to this threat of discovery HMRC had announced their intention for there to be a NDO.

The disclosure notices will require the banks to hand over data on their customers who have UK addresses but non-UK bank accounts, following recent requests by HMRC for the consent required from the courts for the imposition of disclosure notices. HMRC is understood to be in discussions with as many as 30 financial institutions to consider whether or not similar disclosure notices may be applicable in respect of the offshore accounts they run and another 70 institutions may be in the pipeline. These institutions are likely to include, inter alia, private banks, investment banks, building societies and UK subsidiaries and branches of parent banks based offshore.

These notices are issued under Taxes Management Act 1970, s 20(8A) which allows HMRC in some circumstances, after obtaining the consent of the Upper Tribunal's Finance and Tax Chamber (before 1 April 2009 a Special Commissioner), to request documents from third parties in respect of a class of taxpayers whose identity is unknown and for whom there are reasonable grounds to believe that they may have failed, or may fail, to comply with the Taxes Acts. That failure must be likely to result in the serious prejudice to the proper assessment or collection of tax. The documentation requested must not have been readily available from another source, and only documentation within the possession or power of the recipient of the notice is to be provided to HMRC.

The decisions of the court in these four cases have been published by the Tribunals Service, all found in favour of HMRC.

HMRC obtained similar information on more than 400,000 names of individuals and businesses in 2006 and 2007. This information included, for the six years prior to the date of the notice, annual account balances, annual interest arising and details of account transactions for a different month in each of the six years. As a result and in the interest of fairness HMRC offered a partial

amnesty with reduced penalties, entitled the Offshore Disclosure Facility, for those who made a full disclosure of tax irregularities linked to an offshore bank account or asset. It is understood that approximately 45,000 individuals disclosed unpaid tax netting HMRC an additional £400 million. However, HMRC had estimated that a quarter of the names they had would have evaded tax of up to £2.2 billion, so did HMRC get their figures very wrong? They have been pursuing further enquiries in relation to the adequacy of the disclosures made by those who made them and of course they are particularly interested in those who did not make a disclosure.

There have been many reasons given for the failure to disclose (and indeed they may be legitimate) and in our experience some taxpayers are challenged where there is no requirement to disclose. However, being challenged by HMRC is very worrying for most taxpayers at the best of times but at a time of economic uncertainty it can be a very unwelcome distraction.

In all cases if you or someone you know feels that a disclosure may be relevant professional advice should be sought as soon as possible.

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