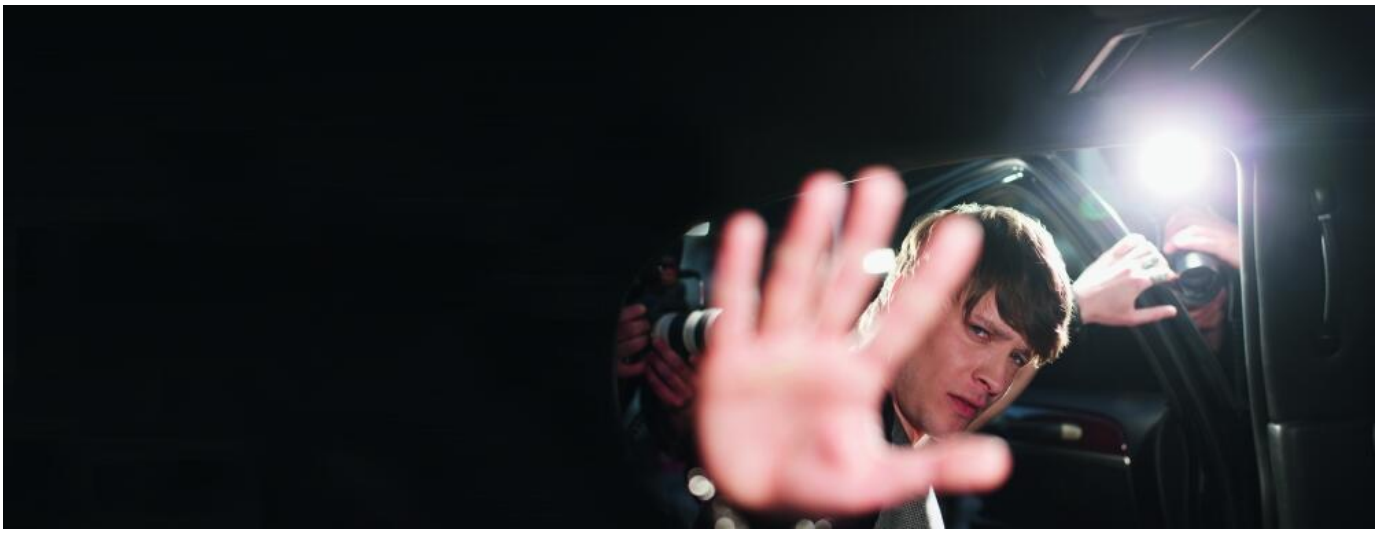
Unwanted publicity!

Management of taxes



01 May 2016

Dawn Register and *Helen Adams* consider HMRC's powers to publish details of deliberate tax defaulters, including forthcoming changes, and compare them to similar powers in other jurisdictions

Key Points

What is the issue?

HMRC's 'naming and shaming' powers are well established and more likely to affect taxpayers because the threshold is static and now affects more tax years. However, the effects of this policy remain unquantifiable

What does it mean for me?

Convincing HMRC that errors and omissions were not deliberate or obtaining maximum penalty mitigation is critical to avoiding publication of a client's details

What can I take away?

Naming and shaming will soon affect prompted offshore issues, regardless of the quality of disclosure reduction achieved, as well as serial tax avoiders

The intended aims of what was quickly dubbed HMRC's 'naming and shaming' power are clearly to act as a deterrent for those who may consider shirking their tax obligations and to encourage those who are yet to disclose intentional under-declarations to rectify their tax positions efficiently. How effective is this policy now that it has been in place for several years? Also, is extending it as set out in FB 2016 justified? With seemingly endless newspaper and television reports of celebrities involved in tax avoidance schemes and large corporates allegedly not paying their 'fair share' of tax, do we really need legislation in this area at all?

The current use of publishing

FA 2009, s 94 contains the UK's legislation permitting the publishing of deliberate tax defaulters' details (PDDD). HMRC's guidance is in its *Compliance Handbook* (see CH190000–CH191400 and CH500000–CH500700).

In practice, HMRC invokes these rules at the end of serious investigations and tax enquiries when a 'deliberate' penalty is determined. However, practitioners handling such enquiry work should warn all clients at the outset about the prospect of naming and shaming to avoid a nasty surprise at closure. HMRC may include the warning in opening enquiry letters along with its latest factsheet.

Currently PDDD affects any 'person', including individuals, companies, partnerships/LLPs, trustees and personal representatives. Three key criteria must apply for the 'person' to fall into PDDD:

1. a tax-geared penalty is imposed for a deliberate misstatement or deliberate failure to notify their liability to tax;
2. the 'potential lost revenue' exceeds £25,000, collectively across all tax types and across all tax years starting after 1 April 2010; and
3. the maximum reduction in the penalty for the quality of their disclosure is not achieved.

The meaning of the penalty behaviour categories remains somewhat subjective. Since only those taxpayers in the 'deliberate' category will potentially be affected by this serious sanction, evidencing and debating with HMRC whether errors were

deliberate, careless or innocent is even more important now.

It is worth noting that the £25,000 threshold of tax loss has not increased since the introduction of this legislation and, because investigation cases may now cover up to five years from the introduction of PDDD, it is relatively easy to breach this threshold even for a small business or individual taxpayer. The role of careful management of enquiries is highlighted because PDDD is not available to HMRC if the maximum reduction for the quality of the disclosure (e.g. under FA 2007, Sch 24 para 9) is achieved. In practice this applies even to the most serious tax fraud cases, which some may argue defeats the idea of naming and shaming. However, the carrot of motivation of the person under investigation to cooperate fully and prevent delays so that enquiries are concluded faster with more efficient use of HMRC's resources is a key aspect of these rules.

Other criteria with which HMRC must comply with for PDDD include:

- publication must occur within 12 months of the penalty becoming final;
- the information must be removed within 12 months of being published; and
- the information can be published anywhere (currently it is restricted to the GOV.UK website).

HMRC is also clear in its manuals that it can defend any human rights or data protection arguments against PDDD.

These provisions can also have far-reaching implications for affected taxpayers, beyond any public ridicule or bad press. As well as their details being published, it is likely that they will be placed in the Managing Serious Defaulters (MSD) programme. Under this, HMRC will monitor their tax compliance for up to five years. In HMRC's own words this can result in 'unannounced inspection visits' and 'rigorous compliance checks'. Clearly, this may be intrusive and distracting as well as increasing the taxpayer's professional costs, but is part of HMRC resourcing cases based on the perceived risk of tax loss.

What does it look like in practice?

In practice the taxpayer is notified of HMRC's intention to publish their details and invited to make representations as to why their details should not be published. HMRC will publish unless there is an exceptional reason why this should not happen;

this is an extremely high bar and it seems would apply only if it would cause serious and verifiable risk to the person's safety or prejudice an ongoing criminal investigation.

Only one First-tier Tribunal (FTT) case has considered PDDD, principally because no formal appeal is permitted against HMRC's decision to publish a taxpayer's details, only against the original penalty's imposition and amount.

In *Chan & Anor v Revenue & Customs* [2014] UKFTT 256 (TC), HMRC charged penalties for deliberate under-declaration of £30,550 SDLT after warning them about PDDD. The internal review officer confirmed the penalties but made no comment on PDDD. Despite protesting in correspondence that they had not deliberately evaded tax, the taxpayers did not appeal further until HMRC notified them that their details would be published. The couple appealed against the penalty late to the FTT, also requesting anonymity and the stopping of PDDD due to the potentially serious consequences for his career and business.

The couple were refused permission to appeal late and their names were published.

The judge concluded: 'The public has an interest in knowing if a solicitor has been found liable to a deliberate inaccuracy penalty and his professional body has the right to consider whether disciplinary proceedings are appropriate. In these circumstances, it would be inimical to justice for the tribunal to protect the solicitor's identity'.

The information that is published should identify the specific tax defaulter in question so the data that is published includes:

- the person's name, including any trading name, previous name or pseudonym;
- their address (registered office for a company);
- the nature of the business;
- the amounts charged: potential lost revenue and penalties;
- the periods involved.

Impact of the policy

As with many behavioural-driven policies, it is almost impossible to measure the impact accurately. However, there are obvious areas where PDDD may trigger improvements. These include tax compliance, reducing the 'tax gap' and shortening

the length of enquiries.

In its *Compliance Handbook* (CH190880), HMRC explains its policy objective: ‘Publishing the details of tax evaders is necessary in a democratic society. It is intended to deter people from avoiding their tax liability. It will therefore strengthen the economic well-being of the United Kingdom. Maximising tax revenue and encouraging compliance with the tax regime is a legitimate policy aim and has clear benefits to the whole of society.’

The list published on 16 December 2015 comprises small businesses and sole traders including takeaways, newsagents, car dealers, an eBay trader and one accountant. Some lawmakers and pressure groups argue that the ‘naming and shaming’ policy has failed to address the real problems, namely offshore tax evasion and aggressive tax avoidance by large corporations and high net worth individuals. If you agree with this diagnosis then, given the details currently published, the ‘medicine’ is not working and there is little evidence of the press coverage and social media commentary that HMRC may want to enhance awareness and create a deterrent. In our experience many taxpayers remain unaware that the policy even exists.

The high percentage penalties charged to those on the PDDD list are striking, with many exceeding 50% of the additional tax due. Although some may say this is just punishment for the ‘crime’, these penalty levels suggest a lack of professional advice. This may confirm critics’ concerns that corporate and wealthy individuals can pay for professional representation to largely avoid PDDD.

However, the other factors to consider are that arrangements intended to avoid tax rarely result in deliberate penalties and that recently the emphasis has been on voluntary disclosures of offshore non-compliance. Both of these reduce the likelihood of deliberate penalties without maximum mitigation, thus reducing the number of people potentially subject to PDDD and increasing the perception that the PDDD may be ineffective.

Lessons from Ireland

Ireland has a similar policy of ‘naming and shaming’ taxpayers. Since 1997 the Irish Tax and Customs has published a defaulters list quarterly. Unlike PDDD, in Ireland publishing:

- occurs only when a penalty exceeding 15% of the tax is charged;
- affects some tax avoidance and technical disputes as well as evasion;
- has a variable de minimis limit based on the amount of tax, interest and penalties being settled depending on the tax years included in the settlement (the limit is lower if older periods are affected).

Ciarán Medlar, head of tax at BDO Ireland, says: ‘The biggest settlements and well-known names are picked up by all the main newspapers in Ireland. Some people say they don’t care about their name being published, but most do. It definitely influences the behaviour of people who care about their profile, even in the local community’.

The policy is applied strictly with no right of appeal, so much so that people started to change their names using Gaelic as a way to hide but this has since been stamped out. Medlar summarised that the policy is a highly effective way to speed up the enquiry process and promote compliance. Before starting an enquiry, the Irish Revenue will write to the taxpayer giving them 30 days to make a disclosure and avoid publication of their details. The ‘naming and shaming’ policy therefore becomes both a carrot and a stick.

HMRC’s most wanted gallery

HMRC also publishes photographs and biographies of the most wanted tax fugitives online, with a link to the Crimestoppers’ appeals to catch other criminals. The list, which is updated regularly, includes people being pursued for VAT fraud, tax evasion and money laundering. Clearly, publication is used to obtain the public’s help to find these people and to encourage them to hand themselves in. The original list received 4.5m views in just under a week so it may be considered an effective way of raising awareness.

Announcing the measure in 2012, the Chancellor George Osborne said: ‘The government has stepped up HMRC’s enforcement activities to enable them to pursue tax cheats relentlessly around the world. This new list will help put more tax fraudsters in the spotlight and bring them to justice’.

This form of ‘naming and shaming’ is now used worldwide to catch fugitives and alert foreign enforcement agencies. Some jurisdictions also make public appeals for those who have not filed tax returns or who owe tax. Among the authorities leading

this drive are:

- the Franchise Tax Board in California, which publishes a list of the top 500 delinquent taxpayers owing more than $100,000;
- Vietnam's General Department of Taxation, which last year started publishing lists of businesses that defaulted;
- the Income Tax Department of India, which introduced a naming and shaming policy in 2015 for those 'who have either gone untraceable or have inadequate assets to pay their taxes'.

With huge pressures on the collection of unpaid tax debts, some may surmise that in the future HMRC may use naming and shaming to encourage payment of old debts. However, the imminent use of HMRC's power in Finance (No 2) Act 2015 to collect debts directly from taxpayers' bank accounts, its extensive other debt enforcement powers and the ongoing availability of cross border cooperation on debt collection (such as the EU's Mutual Assistance in the Recovery of Debt agreement) perhaps make this relatively unlikely.

What is changing in 2016?

Part of the continuing crackdown on tax avoidance and offshore evasion is the inclusion of changes to the PDDD provisions in the 2016 Finance Bill.

FA 2009, s 94 will be amended to remove the current protection from publication if HMRC prompted the disclosure even when full penalty mitigation is obtained by a taxpayer in connection with an offshore matter or offshore transfer. In FB 2016 the protection from PDDD is available only if an unprompted disclosure is made in relation to offshore tax issues. According to HMRC, a disclosure is unprompted when '…the person making it has no reason to believe that we have discovered or are about to discover the inaccuracy or under-assessment' (CH82420). This change is likely to have a significant impact if the number of HMC investigations increases due to automatic exchange of information such as the Common Reporting Standard. The new provisions also strengthen PDDD to tackle offshore evasion carried out through an entity such as a trust, company or partnership. Consequently HMRC will also name individuals who 'control' the entity and obtain a 'tax advantage' as a result of the evasion.

There are provisions in FB 2016 that extend PDDD to ‘serial’ tax avoiders. If a tax avoidance arrangement is defeated after 6 April 2017 a notice will often trigger a five-year warning period. If the taxpayer then uses three or more avoidance arrangements in that warning period which HMRC subsequently defeats the Revenue will publish their details in a similar manner to the existing PDDD provisions.

Necessary or redundant?

After six years of ‘naming and shaming’ tax evaders after enquiries it appears that the impact of this policy on the general population is minimal, both in terms of the number of taxpayers affected and the extent of the deterrent created. Perhaps the critics are right and journalists already do enough to ‘name and shame’ in the public interest. Others will say that it is better to give the press accurate information for reporting and that publishing is a fair punishment, given its in-built encouragement of taxpayers to work with HMRC to resolve issues efficiently. The expected enhancements to PDDD reflect the importance of reputational risk and the rise of tax evasion and avoidance up the political agenda. If HMRC fully utilises the new powers, the impact of naming and shaming might increase dramatically in future years.