A new opportunity

General Features



02 May 2013

Richard Sowler takes an initial look at details currently available on the Isle of Man Disclosure Facility

Key Points

An attractive new disclosure facility in convenient local jurisdiction Opportunities for initial anonymous discussions with HMRC Low penalties, available until the year end

Although HMRC has published details of the terms of the Liechtenstein Disclosure Facility (LDF), the same cannot be said of its Manx equivalent. Signed on 19 February, the Isle of Man Disclosure Facility (IOMDF) has much in common with the LDF and its workings are expected to be broadly similar. But its detail remains sketchy.

Key provisions

The IOMDF is available to ‘relevant persons’ who were not under a continuing investigation by HMRC on 6 April 2013, and who are not investigated after that date and before making their disclosure. Investigation is defined as covering both criminal and civil tax investigations and those under the money laundering legislation. The extension to money laundering investigations is new, and not found in the LDF. A relevant person may be an individual or a company who or which is resident or incorporated in the UK and has a beneficial interest in ‘relevant property’ at any time between 6 April 1999 (for individuals) or 1 April 1999 (for companies) – the ‘cut-off day’ – and 31 December 2013.

> **A Treasury press release states that those not using the IOMDF, and who are later discovered to have undeclared foreign income, will face ‘significantly higher penalties’**

Relevant property includes Isle of Man bank accounts, certain annuity contracts (excluding pensions and annuities related to benefits) and cash value insurance contracts (typically life policies with a surrender value, but also extending to other situations). It also includes companies (widely defined to include corporations, institutions structured as corporations and companies without legal personality), partnerships, foundations, establishments, trusts, trust enterprises and financial entities that are (one cannot paraphrase – and it is the same in the LDF) ‘issued, formed, founded, settled, incorporated, administered or managed’ in the Isle of Man. The IOMDF may prove to be broader than the LDF here, as the latter did not specifically cover annuities, although it does extend generally to insurance policies (not further defined).

As with the LDF, the IOMDF is not available if the offshore account etc was opened through a UK branch or agency of a bank or, presumably, insurer. It cannot be used

in the case of ‘criminal property’ arising from crimes other than tax evasion. Moreover, it is not available if contact has been made with, or by, HMRC in relation to any other disclosure facility. This contrasts with the LDF, which is available to participants in the Offshore Disclosure Facility or the New Disclosure Opportunity. It seems that the taxpayer will be able to swap from the IOMDF to the LDF, but not vice versa, although guidance may modify this. Anyone who is a ‘relevant person’ for the purposes of the UK/Swiss Agreement is also barred from the MDF – they have a more specific facility available. This last exclusion will affect principally holders of Swiss bank accounts, but this relevant person definition is complex and the associations with Switzerland of potential IOMDF disclosers will need careful analysis. For example, the beneficiary of a discretionary trust having Swiss trustees is not a relevant person under the UK/Swiss Agreement.

HMRC are to provide what the MOU terms a ‘bespoke service’, in terms similar to those in the LDF. This includes an opportunity to approach HMRC anonymously through a professional adviser or financial intermediary to discuss the taxpayer’s circumstances. This is particularly valuable, since the IOMDF (unlike the LDF) does not confer immunity from criminal prosecution: the MOU states that it is without prejudice to the application of HMRC’s published criminal investigation policy. Clearly, any adviser who is not able to get some reassurance on this during the anonymous phase of the process can advise the client to pursue the LDF, if available to that client. (One can envisage conversations with HMRC akin to those with a crown court judge when trying to ascertain whether the client’s guilty plea may avert a custodial sentence.) HMRC’s line on prosecution seems to be hardening over time. Another limb of the bespoke service is that HMRC will provide a single point of contact within the HMRC team for the process to ensure consistency of treatment and no doubt continuity. Further, they will consider issues of domicile and residence and instalment payments, and will also assist in settling other UK tax liabilities which may have come to light as a result of the required full disclosure. Disclosers are protected from the ‘name and shame’ rules, and HMRC will assist with compliance matters for all periods up to April 2016.

Where the benefit of the IOMDF is available, no tax on liabilities arising before the 1999 cut-off day will be charged, nor will there be any penalties in respect of such tax. Between the cut-off day and April 2009 penalties will not exceed 10% of tax due and for later years they will not exceed the minimum penalty (currently 20%).

The Isle of Man and the UK are also entering into an automatic tax information exchange agreement. A Treasury press release states that those not using the IOMDF, and who are later discovered to have undeclared foreign income, will face ‘significantly higher penalties’. In such cases, criminal prosecution may result, especially given recent statements that HMRC will be seeking to quintuple the number of prosecutions that they undertake. Non-disclosers of foreign income seem low-hanging fruit.

Timings

Reference has been made above to various dates, but it is as well to bring them together.
The IOMDF stated on 6 April 2013;
Assets must be moved to the Isle of Man (if not already there) by 31 December 2013. This is a first deadline and the time allowed is not generous. It is notably shorter than the period allowed under the LDF for transferring assets to Liechtenstein, which extends to the final compliance date of 5 April 2016;
The IOMDF will run until 30 September 2016, after which no new disclosures will be possible, an improvement of more than six months on the LDF, where the final date is 5 April 2016.

> **The lack of immunity of disclosers from prosecution will be a significant discouragement – and make the adviser’s role more difficult**

Further LDF agreements

In the case of the LDF, a joint declaration was signed by the governments of the UK and Liechtenstein, under which the UK recognised the assistance of Liechtenstein and undertook to enter into a double-tax treaty, which has now been concluded. Further, the joint declaration stated that the UK was grateful for the cooperation of Liechtenstein financial intermediaries and noted that it would be ‘highly unlikely to be in the public interest of the United Kingdom to undertake a criminal investigation against such persons for past actions or inactions relating to possible breaches of tax laws’.

In a second joint declaration this was extended to their employees. No doubt Manx financial intermediaries would welcome (and indeed expect) similar reassurances. A third joint declaration extended the final compliance date by a year from the original 31 March 2015, so there is a precedent for some renegotiation of the IOMDF, which, it is to be hoped, will be achieved by the parties.

Conclusion

The IOMDF is a welcome addition to the opportunities available to defaulters to put their tax affairs in order. Reasons for the exclusion of those already beginning to participate in other facilities are not clear. The lack of immunity of disclosers from prosecution will be a significant discouragement – and make the adviser’s role more difficult. Taxpayers with undeclared BVI or Cayman (for example) income may have to wait until near the IOMDF deadline for moving funds to see whether any similar, and more beneficial, facility is offered there, but this seems unlikely. We await further information from HMRC to evaluate the IOMDF fully.