Offshore tax evasion – FB 2016 cll 150 and 154

Management of taxes

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The CIOT has written to HMRC expressing concerns about the new civil penalties for enablers of offshore tax evasion and the new strict liability criminal offence

We have written to HMRC to express concerns about Finance Bill 2016 cll 150 and 154.

Finance Bill 2016, cl 150 and Sch 20 introduces new civil penalties for deliberate 'enablers' of offshore tax evasion or other non-compliance, including a power to publish information about the enabler.

We are concerned that the legislation applies to failure to take reasonable care as well as to tax evasion on the part of the taxpayer. Schedule 20 para 1(1) reads: 'A penalty is payable by a person who has enabled another person to carry out offshore tax evasion or non-compliance…' It is our view that the legislation should differentiate deliberate behaviour from 'non-compliance' (which, although it is not defined, we assume must mean failure to take reasonable care or careless behaviour). Failure to take reasonable care is not tax evasion. We point out that tax evasion requires fraudulent conduct, and is broadly synonymous with deliberate conduct as used in Finance Act 2007, Sch 24. It should be possible for 'enabling' to have taken place only when the taxpayer has acted deliberately to evade tax.

The definition of 'enable' in para 1(2)(b) includes the term 'otherwise facilitating'. This seems vague, requiring no active involvement on the part of the enabler and is therefore potentially very wide. The term needs to be clearly defined so that its meaning can be properly understood. We also note that the term 'deliberate' is not used in the legislation when referring to the enabler's behaviour, despite the policy

paper clearly stating that the penalty applies only if the enabler's behaviour is deliberate. We will continue to seek clarification from HMRC about how it is intending to apply the legislation and target the new penalty.

Finance Bill 2016, cl 154 introduces a criminal offence that does not require the need to prove intent for failing to declare offshore income and gains. While restating in our letter our strong support for HMRC's efforts to tackle tax evasion, we reiterate our overall objection to the introduction of a strict liability offence. We continue to believe, as a matter of principle, that it should be necessary to show 'mens rea' – that a taxpayer had criminal intent – before they can be convicted of a serious criminal offence such as offshore tax evasion.

Changes have been made to the legislation since consultation and go some way to reassuring us that the government is serious about fulfilling its promise that the new offence will be used in the most serious cases only. These changes include:

- a threshold of not less than £25,000 of tax lost each tax year (up from £5,000): and
- the offence will relate only to income and gains that are not reported under the common reporting standard (CRS) to target the offence at those jurisdictions where HMRC have most difficulty in detecting offshore evasion.

Although the threshold of not less than £25,000 is contained in primary legislation, the application of the offence solely to non-CRS jurisdictions is to be contained not in primary legislation but in regulations that have yet to be published. The draft legislation is wide on the definition of 'offshore income, assets or activities' that can be from a source in, situated in, or carried on in 'a territory outside the United Kingdom'. Our concern is that HMRC could easily step back from the promise to relate the offence to non-CRS jurisdictions only, if it wished.

In the political climate since the leak of the Panama papers, there will no doubt be increased pressure on HMRC to take more prosecutions in cases of offshore tax evasion. This raises the possibility that all non-CRS data linked to offshore tax evasion will automatically be processed as a criminal offence.

We continue to be uncertain about how the offence will interact with the contractual disclosure facility (CDF), which requires the taxpayer to admit fraud. We therefore continue to seek clarification from HMRC about how it intends to operate and target the new offence. Our view is that the offence should apply only to deliberate

behaviour and not target taxpayers who make full voluntary unprompted disclosures.

The full text of the CIOT responses can be found on the CIOT website.