FATCA: impact on trusts and trustees

Technical

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Most of us will have heard of FATCA – the Foreign Account Tax Compliance Act – which requires financial institutions (FIs) outside the US to pass information about their US customers to the Internal Revenue Service (IRS). Understandably, many of us will have dismissed it on the basis that it is a problem for banks and investment houses only. Although there is some truth in this – the burden of FATCA will fall most heavily on banks and the like – it is important that all members are aware of their own and their clients' responsibilities under the FATCA provisions, particularly if a member is a trustee or acts for a trust.

To assist members, the CIOT has posted a short briefing note on its website (see www.tinyurl.com/pvv2mrs). The note includes links to HMRC guidance and guidance, including a webinar and a flowchart, on the Society of Trust and Estate Practitioners (STEP) website. This topic was considered by Stephen Coleclough in his article Attention all trusts in the October 2014 edition of Tax Adviser (www.tinyurl.com/nc2n7r8).

A short summary of the key points made in our briefing note follows:

- depositary institution –accepts deposits in the ordinary course of a banking or similar business;
- custodial institution – holds financial assets on behalf of others as a substantial portion of its business in the UK;
- investment entity – either one that undertakes investment activity on behalf of customers or one that meets a financial assets test (at least 50% of its income comes from financial assets) and broadly is managed by an FI (see below);
- specified insurance company – issues cash value insurance or annuity contracts; and
- holding companies and treasury centres of financial groups – excluding (in most circumstances) companies/centres that are part of a non-financial group.

HMRC guidance is that, most commonly, a trust will be an FI if it meets the definition of an investment entity. Having identified that at least 50% of the trust income arises from financial assets, in many cases, the deciding factor is likely to be whether the trust or its activities are being ‘professionally managed’. For HMRC, this would typically be where either one of the trustees is an FI or the trustees have appointed a discretionary fund manager to manage the trust’s assets. If the trust is not being ‘professionally managed’ in this way (even though an accountant or solicitor may be a trustee), it will not be an investment entity.

What must an FI do?

An entity which is an FI must register as an FI with the IRS which will issue it with a Global Intermediaries Identification Number (GIIN). The entity will need to report any payments made to or for a US person. In addition, the IRS must be assured that the FI has adequate systems in place to identify and record US persons.

Penalties may be charged for non-compliance with the FATCA provisions.