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Sticks without Carrots - The Worldwide Disclosure Facility and the Requirement to Correct

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Tony Monger focuses in on the essential problem with these proposals

Anyone who is asked to write about the Worldwide Disclosure Facility (or ‘WDF’) soon finds themselves musing on the meaning of the term ‘Facility’. The word originates with the Latin term *facilis* which means “easy”. If you facilitate something, you make it easier and a ‘facility’ is by definition a process or structure or piece of equipment that is designed to make something easier. And that’s where you begin to struggle with the WDF – because it is difficult to see how the WDF makes anything easier.

For those of us who recall the days when HMRC used to say that they would never give any kind of amnesty to anyone, it is surprising to realise that we now have a history of Disclosure Facilities of one sort or another going back to just 8 months short of a decade. It all started with the Offshore Disclosure Facility (or ‘ODF’) which ran from April to November 2007. Older readers will recall that HMRC had issued notices to five High Street banks for details of UK customers with offshore accounts and a facility was offered with a reduced penalty for those who came forward, confessed and coughed up the cash. The ODF was followed in August 2009 by the ‘New Disclosure Opportunity’ (NDO) which focused on the customers of 300 offshore banks with branches in the UK which in turn was followed swiftly in September 2009 by the Liechtenstein Disclosure Facility (LDF).

The LDF will be fondly remembered by many advisers as the biggest and best of all of the offshore disclosure facilities. Certainly biggest in terms of money, with a yield by March 2016 of £1.26 billion, the LDF proved so popular that it was extended twice with last applications for membership being accepted as recently as December 2015. As well as a very low penalty loading, the LDF had a number of very attractive features including a guaranteed immunity from prosecution together with an assurance that one would not be named and shamed. Paying tax at a 40% Composite Rate could also wipe out any pesky IHT charges that might be lingering about but, best of all, you could even join the LDF by opening an account with a Liechtenstein bank. As they say in New York, what’s not to like?

Of course, one of the reasons that the LDF scored so well in terms of financial yield is that it overlapped the period of the UK/Swiss tax agreement – thereby encouraging many an evader to jump their hidden funds from a Swiss to a Liechtenstein bank to avoid the otherwise swingeing tax charge that might be levied by the Swiss authorities based on a hefty percentage of the capital held in your account. All in all, there were a great number of aspects to the Liechtenstein Disclosure Facility that did indeed make it easier for advisers to persuade their more recalcitrant and wayward clients to sign up.

In addition to the various facilities mentioned, there have also been a plethora of on-shore facilities for different trades and professions – from gas fitters to medical consultants – and, beyond that, a few specific offshore facilities to mop up what might be called our 'home-grown tax havens' – i.e. Jersey, Guernsey and the Isle of Man. These last facilities lacked many of the more attractive features of the LDF – such as the guaranteed immunity from prosecution – but still offered at least a lower penalty loading than might otherwise have applied. This lack of attraction might account for the relatively low levels of settlements coming from each, producing a total from all three of less than £15 million – which, when compared with the LDF seems very small beer indeed.

And so to the Worldwide Disclosure Facility, announced on 5 September 2016, which offers participants – well, to be precise, nothing. Is there a reduced penalty? Nope, the terms of the facility require that you must calculate interest and penalties "*based on the existing legislation*". Is there a guaranteed immunity from prosecution? Nope, HMRC "*reserves complete discretion to conduct a criminal investigation in any case*." Do you get a long time in which to make your disclosure? Nope, you have 90 days after receiving your notification acknowledgement. Do you get time to pay? Nope, it is a requirement of the terms that you must make payment at the time of submission of the report. If you are not in a position to do that, you need to speak to HMRC in advance to agree payment arrangements.

Will you be named and shamed? Well, yes, quite possibly. As the terms say, if you fail to make a complete and accurate disclosure, or *if you refuse to send in any additional information*, HMRC may

- Impose a higher penalty or
- Open a civil or criminal investigation or
- Publish your name and address on the HMRC website
- Or all three of the above.

So, how then does the adviser encourage a client to make his confession? There are certainly no carrots on offer here – and it would seem that the answer lies in the sticks with which the taxpayer might be beaten if he fails to come forward. For detail we turn, amongst other similar threats, to the Consultation Document entitled "*Tackling offshore tax evasion: A requirement to Correct*."

It is no coincidence that this document was published on 24 August 2016, less than a fortnight before the WDF. In essence the proposal is that HMRC will introduce new legislation that will oblige taxpayers with undisclosed offshore liabilities to correct their past irregularities – the so called "Requirement to Correct" or RTC- and will strongly penalise those who do not meet this obligation. This will be a penalty for FTC, standing for "Failure to Correct". The proposal is linked with the Common Reporting Standard (CRS) under which HMRC has initiated agreements with over 100 countries, including Crown Dependencies and Overseas Territories whereby the various tax authorities will provide each other with data on the beneficial owners of companies and trusts.

The first exchanges under the CRS will begin in 2017 (for the 54 'early adopter' countries) with everybody else joining in during 2018. HMRC is describing the CRS as a "sea change" that will fulfil its long held and much proclaimed ambition to leave taxpayers with "no hiding place".

The sticks with which a taxpayer might be beaten for FTC are many and severe – and all the more so when coupled with other recent legislation being introduced in Finance Bill 2016 which includes, amongst others, a new strict criminal offence for failing to declare offshore income and gains, higher civil penalties for offshore tax evasion and new civil sanctions for those who enable offshore evasion. On top of all these we also have the new criminal offence to apply to corporates who fail to prevent their representatives from facilitating tax evasion.

Under the RTC the suggestion is that any taxpayer who still has tax irregularities that relate to offshore interests must step forward and correct those liabilities on or before 30 September 2018. Under the current legislation, the heaviest penalty that can be imposed for an offshore offence is twice the tax (a 200% penalty for deliberate and concealed evasion involving a category 3 country). Under the RTC, the maximum penalty could be boosted by 50% of the standard penalty – theoretically increasing the maximum penalty for a deliberate and concealed offence in a category 3 country to 300% of the tax. In addition to the tax geared penalty, if the potential lost revenue was more than £25,000, the taxpayer would also be liable to an asset-based penalty of up to 10% of the value of the asset. Depending on the asset involved – a property? A yacht? A private jet or helicopter? – the asset based penalty alone could be enormous.

All the foregoing would seem to suggest that HMRC believe that there are still millions and billions of evaded tax to be found offshore. And yet the RTC Consultation Document has one peculiarity in that it evaluates the impact of all this on the Exchequer as being nothing. They estimate the Exchequer impact for 2016/17 as being 'negligible' – with the same 'negligible' estimate for 2017/18, and 2018/19, and 2019/20 and 2020/21 and conclude with the statements that "*This measure is expected to have a negligible impact on the Exchequer*" and "*This measure is not expected to have any significant economic impacts*."

The reader, like the author, might be doing a double-take at this point and asking what on earth is this all about? How then does this reconcile with the supposed 'sea change' being brought about by the Common Reporting Standard? All the HMRC proclamations talk in terms of it having been "*too easy [in the past] for people to hide their money overseas to evade tax*" and of HMRC's commitment to "*cracking down on tax evasion*" with an intention to be "*relentless in its pursuit of evaders*." How then does HMRC conclude that this will all have a negligible impact on the Exchequer? Could it be that, actually, there might not be that much money left offshore?

A realistic appraisal of the results of the past HMRC disclosure regimes could actually suggest that that might be the case. Going all the way back to the original ODF of 2007, when HMRC was persuading the Commissioners to issue the Section 20 Notices that got the offshore information from the High Street banks, they argued that they expected each enquiry to yield between £94,935 and £164,000 *per case*. Some 45,000 taxpayers made disclosures under the ODF, yielding some £512 million. Whilst at first sight that might seem good, it actually worked out at an average of only £11,500 per head. In due course the NDO was predicted as going to bring in £500 million but actually produced only £156 million. In this case the yield per head was about £28,500 – but still less than a third of the lowest estimate suggested in the original Section 20 application.

In 2012 the then Permanent Secretary to the Treasury, Dave Hartnett, was predicting that the LDF would yield £3 billion but, as mentioned above, HMRC statistics show that by March 2016 it had brought in less than half of that, £1.257 billion – and remember that figure will include all those Swiss bank account holders who swapped to a Liechtenstein account.

The yield from the Crown Dependencies – Guernsey, Jersey and Isle of Man – works out at a miserable average of £30,000 per head – which does rather fly in the face of Mr Hartnett's assertion, in an interview with the BBC in September 2009, that "*Big international banks which are in the UK have got vast amounts of money here or in the Channel Islands…on behalf of UK residents*."

So, is then HMRC's assessment that the yield from the RTC will be negligible a realistic appraisal of the situation? If so, why are the sabres being rattled so hard? The suggestion is that the Common Reporting Standard will provide HMRC with details of the owners of all these offshore companies and trusts and this will result in a flood (or, if it is a sea change, perhaps that should be a tsunami) of evaded tax being washed ashore. Is it perhaps possible that, actually, it will not and either those companies and trusts are all perfectly legal and law-abiding – or the information that will come from CRS might not actually be that useful?

Only time will tell – but one thing is already certain. For tax advisers, it can already be an uphill task to convince a client to sign up for any disclosure 'facility' – but if the facility offers no concessions or benefits and retains the threat of a criminal prosecution, the task becomes well-nigh impossible.

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