TAXAdviser

Catching the unwary

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Anton Lane explains what advisers need to know about the wide-ranging anti-avoidance legislation introduced by HMRC

What is the issue?

HMRC have introduced wide-ranging anti avoidance legislation in their ongoing battle against offshore tax evasion. The scope of the legislation may catch the unsuspecting. An adviser may be compromised with their approach to clients benefiting from offshore tax structures.

What does it mean for me?

If you have clients benefiting from offshore structures or holding offshore assets, your clients and your risks have increased considerably.

What can I take away?

Risk exposure should be identified and managed by advisers.

This year's anti avoidance legislation comes against the backdrop of the automatic information exchange agreements which have been entered into between 101 countries: 54 are exchanging by 2017 and the remaining 47 will do so by 2018. The measures will give the UK government considerably more knowledge of offshore structures potentially used to evade or avoid taxes.

Although this article concentrates on the offshore criminal offence, the legislation – within FA 2016 – also provides for several sanctions against tax avoidance and evasion. The general anti-abuse rule, first introduced by the FA 2013 and modified regularly since, has now been further modified to include counteractions and a process of linking arrangements to lead arrangements and, of course, penalties.

Serial tax avoiders and promoters of tax avoidance schemes have been targeted and an array of provisions to counter offshore tax evasion are to be brought into effect, including:

- Section 162: penalties for enablers of offshore tax evasion or non-compliance;
- Section 163: penalties in connection with offshore matters and offshore transfers;
- Section 164: offshore tax errors etc, publishing details of deliberate tax defaulters;
- Section 165: asset-based penalties for offshore inaccuracies and failures; and
- Section 166: offences relating to offshore income, assets and activities

This article considers the position for advisers and is therefore concerned with ss 162 and 166.

Penalties for enablers

Section 162, which introduces Sch 20, provides for a penalty in relation to historic transactions when they come to the light of an officer. Two conditions need to be met – these are Condition A and Condition B.

Condition A is that the person knew, when carrying out their actions, that those actions enabled or were likely to enable offshore tax evasion or non-compliance. There will be an area of some contention here, namely circumstances involving failed offshore tax planning or avoidance schemes.

Condition B can be met in three ways. Firstly, if the enabled person has been convicted of a 'relevant offence' and the time allowed for appeal has expired. Secondly, if they are liable to a relevant penalty and the time allowed for appeal or further appeal has expired. Thirdly, if they have entered a contract under which the Commissioners undertake not to assess and/or recover the penalty.

The definition of 'relevant offence' brings penalties for enablers together with offenses relating to offshore income, assets and activities. The offences relating to offshore income, assets and activities that are applicable for the purposes of Sch 20 are ss 106A to 106D. These offences are for failing to give notice of being chargeable to tax or deliver a return and for delivering an inaccurate return. A relevant offence also includes cheating the public revenue involving offshore activity. A 'relevant civil penalty' relates to the existing penalties that may arise because of involving an offshore matter, activity or assets.

So what is an enabler? An enabler may have simply encouraged, assisted or otherwise facilitated the taxpayer to establish an offshore structure. The taxpayer's actions could amount to a relevant offence and the enabler could be brought within the scope of a penalty. The enabler, who may have once encouraged the use of an offshore structure (believing the structure was legitimate) may have to rely on successfully arguing they did not know those actions enable or were likely to enable tax evasion or non-compliance under Condition A to avoid a penalty.

The legislation defines 'conduct' as including a failure to act. Conduct involving offshore activity is defined widely, to involve an offshore activity if it involves an offshore matter or transfer, or a relevant offshore asset move. The definition broadly covers income, assets or activities in a territory other than the UK. For inheritance tax purposes the legislation considers where assets are held following a transfer of value.

The penalty is set by Para 3(1) or 3(2) of Sch 20. Paragraph 3(1) relates to a penalty payable under Sch 20 Para 1. Paragraph 3(2) relates to a penalty under FA 2015 Sch 21 Para 1: penalties in connection with offshore asset moves. The Sch 21 penalty applies to income tax, capital gains tax and inheritance tax relating to where assets are moved from a 'specified territory' to a 'non-specified territory'. Territories that qualify as specified include those committed to the automatic exchange of information under the common reporting standard. The penalty is aimed at those who move (or have moved) assets with the intention of avoiding HMRC identifying them.

A Para 3(1) penalty is the higher of 100% of the potential lost revenue or £3,000. For Para 3(2), it's 50% of the potential lost revenue of the original tax non-compliance or £3,000 respectively. Potential lost revenue broadly takes the amount of lost revenue that arises for the purposes of penalties to the person who was enabled to carry out offshore tax evasion or non-compliance. Just and reasonable apportionment is available where the potential lost revenue relates to both offshore tax evasion or non-compliance and other evasion or non-compliance for the purposes of calculating the enabler's penalty.

Although the penalties could be severe, they may be mitigated. Reductions are available where the enabler makes a disclosure or assists HMRC with any investigation leading to the person who was enabled being charged with a relevant offence or found liable to a relevant penalty.

Disclosure includes telling, giving reasonable help and allowing access to records. Assisting HMRC includes helping or encouraging the enabled person to disclose, access to records and any other relevant conduct.

HMRC may also reduce the penalty because of special circumstance but this does not include affordability.

The penalty must be paid within 30 days, beginning on the day notification is issued. An assessment to a penalty under s 20 Para 1 may not take place more than two years after the fulfilment of Condition A and B first came to the attention of an officer of HMRC.

There is a right of appeal against the decision to assess a penalty as well as against the amount of penalty. An appeal against a penalty is subject to the same appeal rights and procedure as an appeal against an assessment to tax. There is no requirement for the appellant to pay a penalty before an appeal is determined.

For the professional adviser, the penalty mitigation causes numerous problems. It is entirely necessary for the adviser to encourage disclosure where there are tax irregularities. However, what happens when the adviser's opinion is that there are not irregularities? The tax legislation and case law applying to offshore structures is considered notoriously complicated by the profession and many would refer to the law being 'grey'.

The relationship with the client may also be put at risk given that suggestion of disclosure may bring into question the validity of previous tax advice. This may encourage advisers to manage their own risk by notifying insurers. Insurers may also be concerned about how and why an adviser is suggesting a client make a disclosure.

Furthermore, if a disclosure is being recommended, would it not also be prudent to make a report for money laundering purposes?

It may therefore be useful for an adviser to suggest the client speak with a suitable specialist. In such circumstances, the advice should constitute assisting or encouraging the enabled person to disclose and the specialist may assist managing the client/adviser relationship.

Information powers have been adapted to check a 'relevant person's' liability to a penalty. The definition of a 'relevant person' is when an HMRC officer has reason to *suspect* the person has or may have enabled offshore tax evasion or non-compliance by another person so as to be liable to a penalty under Paragraph 1.

Schedule 36 of the Finance Act 2008, still relevant, defines a 'tax adviser' as a person appointed to give advice about the tax affairs of another person. They may be appointed directly by that person or by another tax adviser of that person. The information powers could therefore potentially be used to obtain information from a person holding themselves in a position of authority as to the tax treatment of a particular transaction to another person.

There is also a power to inspect business premises of involved third parties where it is reasonably required by the officer for the purpose of checking the position of any person or class of persons as regards a liability for a penalty under Paragraph 1, Schedule 20. The risk and disruption for an adviser of an information request and/or inspection of business premises could be significant and both would need to be carefully managed.

Offences

Sections 106B–106H were inserted into TMA 1970 by FA 2016 s 166, introducing the new criminal offences which apply for the purposes on income tax and capital gains tax only, where a person has failed to declare offshore income or gains in accordance with TMA (1970) ss 7 and 8. The offence applies where the loss of tax meets the threshold amount.

Section 106B is the offence of failing to give notice to being chargeable to tax. Section 106B(1) establishes a new criminal offence if a person was required and failed to give notice to being chargeable to income tax, capital gains tax or both for a year of assessment and the tax chargeable is wholly or in part on or by reference to offshore income, assets or activities.

Section 106C is the offence of failing to deliver a return. Section 106C(1) establishes the offence where there is a failure to deliver a tax return following a notice under TMA 1970 s 8 and the return is not so delivered before the end of the withdrawal period, when an accurate return would have disclosed a liability to income tax or capital gain tax or both and the amount of tax is greater than the threshold.

Section 106D is the offence of making an inaccurate return. The offence is where a person who is required by notice under TMA 1970 s 8 to deliver a return and at the end of the amendment period, it contains an inaccuracy and the amendment results in tax greater than the threshold.

The offences are subject to a threshold amount of tax, below which there is no offence. The amount is currently £25,000 although HM Treasury may by regulations specify the amount for the purposes of ss 106B to 106D. A reasonable excuse defence is possible for Section 106B and 106C and a reasonable care defence is available for 106D.

Section 106E sets out exclusions from offences, which include persons responsible for giving notice for making a return by virtue of being a trustee of a settlement or an executor or administrator of a deceased person.

The offences do not prescribe the need to prove intent for failing to declare taxable offshore income and gains.

Supplementary provisions under s 106F provide that where HMRC, the Tribunal or an officer extend the time limit for giving notice or delivering a return: the period under the new offences is also extended. Furthermore, it provides for amending the threshold amount as well as the method of calculating the tax for the purposes of the threshold amount.

Section 106G provides for the penalties for the new offences on summary conviction. A person guilty of an offence under ss 106B, 106C or 106D may face an unlimited fine and/or imprisonment not exceeding 51 weeks (six months in relation to an offence committed before section 281(5) Criminal Justice Act 2003). In Scotland or Northern Ireland, the fine must not exceed Level 5 on the standard scale and/or to imprisonment for a term not exceeding six months.

The offences are intended to catch those situations where detailed advice has not been sought or where it was not followed properly. However, there is a risk that HMRC taking an aggressive approach may seek to push the boundaries in a move to deter and combat tax mitigation/avoidance as well as evasion.

For example, employee benefit trusts were largely established offshore and their tax treatment has consistently been the topic of the courts. The position for both client and adviser could be exceptionally uncomfortable if it were not for a reasonable excuse, although will that reasonable excuse be reasonable post the settlement opportunity or the decisions in the cases of *Murray* and *Boyle*, and the disguised remuneration legislation?

Other difficult situations include those where the adviser to an offshore tax planning structure has not been continually involved, or where the client has deviated from advice. For example, it is easy for the management and control of an offshore company to be compromised by the interaction of a client.

What can advisers do next?

It appears that advisers with offshore affairs have little option but to review the tax risks associated with them. Clients with offshore interests should be informed of the new offences and the consequences and encouraged to consider whether there is a requirement to disclose. Consideration should be given to speaking with a specialist to discuss risks and how HMRC may view or challenge a structure. Advisers will also need to consider both potential notifications to insurers as well as anti-money laundering reports.

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