

# Under the spotlight

Tax risk and dispute resolution  
special edition

## Offshore accounts - the New Disclosure Opportunity (NDO)



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Welcome to this special edition of Under the spotlight which focuses on HMRC's New Disclosure Opportunity (NDO). I hope you find it informative. After being trailed in the 2009 Budget, HMRC has now formally launched the 'New Disclosure Opportunity' (NDO), which is often referred to in the press as a 'tax amnesty'. This is effectively a follow up to 2007's Offshore Disclosure Facility (ODF) which raised approximately £400m for HMRC.

The 2007 initiative followed HMRC's success in obtaining details of offshore bank accounts operated by UK residents from the five main high street banks: Barclays, RBS, HBOS, HSBC and Lloyds. Since then, HMRC has been seeking to obtain similar information from other banks and financial institutions with operations in the UK. This process has culminated in HMRC successfully obtaining information notices that will require over 300 banks and financial institutions to provide HMRC with similar information.

HMRC intends the NDO to be a cost effective way of collecting substantial amounts of tax with relatively little input from itself. Once it has received the disclosures under the NDO it will focus its resources on using the information received from its approaches to banks to investigate those who did not come forward.

HMRC hopes that the incentive of a fixed 10% penalty, combined with the high risk of being caught as a result of the information it is obtaining from the banks, will mean that large numbers of people decide to use the NDO to disclose unpaid liabilities. HMRC has indicated that it expects the NDO to generate additional tax, interest and penalties of £150m in 2009/10 and a further £350m over the next three years from following up people who failed to take the opportunity to make a disclosure under the NDO.

This special edition looks at the key facts, who is likely to be affected and provides Ernst & Young's view on this new HMRC initiative.

As ever, we welcome feedback, so please let us know your views.

# The New Disclosure Opportunity - Rob Brockwell discusses the background and likely impact of HMRC's last big push to bring tax evaders using offshore bank accounts into the UK tax net.

Both the ODF and NDO have arisen out of HMRC's success in using its information powers to obtain details of offshore accounts operated by people with UK addresses from banks with operations in the UK. Prior to the ODF, HMRC obtained information from the five major high street banks using its powers under Section 20(8A) TMA 1970. It is thought that HMRC received details of around 4 million offshore bank accounts as a result of these information notices. The ODF, a simplified process for making voluntary disclosures with a fixed 10% penalty attached, was introduced as a way of collecting the tax due in respect of these accounts as cost effectively as possible.

Since 2007 HMRC has been seeking similar information from other banks and financial institutions operating in the UK, including those with headquarters outside the UK. The introduction of new information powers in Sch 36 Finance Act 2008 has allowed HMRC to accelerate this process. Unlike HMRC's equivalent former power under S20 (8A) TMA 1970, Para 5 Sch 36 allows HMRC to apply direct to the Tribunal for an information notice without giving banks an opportunity to voluntarily provide the information or to make representations to the Tribunal.

To further speed up the process HMRC made a 'blanket' application to the Tribunal for the issue of notices, using generic information to support the applications. The Tribunal has now approved the issue of these notices to over 300 banks.

These notices were approved in the middle of August and are believed to allow approximately 90 days for the banks to provide the information. Even ignoring the possibility that some banks may challenge these notices, it is, therefore, unlikely that HMRC will have received much of the information in advance of the closure of the NDO registration window on 30 November 2009.

## Key differences from ODF

### *Advertising*

For the ODF HMRC did not run an advertising campaign, preferring to rely on media coverage to publicise the facility. Additionally, HMRC persuaded banks to write to affected customers advising them of the account details that had been passed to HMRC. This time around, HMRC has taken the decision to run an advertising campaign, expected to be launched in September, to make sure that public awareness of the arrangement is as high

as possible. However, for the NDO, HMRC is not asking banks to issue letters to customers, leaving the decision on whether to do this to the banks themselves. It is not known yet how many banks will choose to write to customers along these lines, and if they do, whether they will be in a position to issue these letters in advance of the deadline for registering with HMRC for the NDO of 30 November 2009, given that the notices were not approved until mid-August.

The receipt of letters from their banks under the ODF was in many cases the prompt that persuaded people to make a disclosure. The possible absence of similar correspondence this time around may lull people into a false sense of security that HMRC may not be successful in getting details from their bank. We believe this would be a mistake. HMRC's success in obtaining notices for over 300 banks means that now is the time to come clean - failure to do so will almost inevitably mean higher penalties and possibly worse.

### *Acceptance of disclosures by HMRC*

As with most cases involving underpayment of tax, disclosures under the NDO are to be settled by means of a contract settlement. The disclosure

## Who is affected by the NDO?

Any UK resident with unpaid tax liabilities connected to an offshore bank account is potentially affected. This includes individuals, companies, partnerships and trusts. There is no de minimis amount that does not require disclosure, although a penalty will not be charged if the unpaid tax is less than £1,000.

The source of overseas capital is of as much interest to HMRC as any undeclared income arising from the account itself. Typical examples seen under the ODF included:

- ▶ Undeclared takings from a UK trade deposited offshore
- ▶ Undeclared income from holiday homes abroad
- ▶ Inheritances received offshore
- ▶ Income earned offshore by UK residents not reported in the UK
- ▶ Remittances by non-UK domiciled individuals not correctly declared in the UK



## Rob Brockwell +44 (0)20 7951 2764

Rob has been working in the area of tax enquiries and investigations for over 20 years. A Chartered Tax Advisor and a former Inspector of Taxes, Rob has extensive experience of all types of enquiries, including both personal and corporate taxes.

forms to be submitted by 12 March 2010 include a 'letter of offer' that needs to be completed and signed by the taxpayer. Assuming HMRC is satisfied with the offer, the matter is then normally finalised by HMRC issuing an acceptance letter. However, under the NDO, HMRC has advised that whilst a high percentage of 'low risk' cases will be issued with an acceptance letter within four months, other cases may never be formally accepted.

Failure to issue an acceptance letter means that the contract settlement is never formally concluded. Whilst HMRC's position is protected by the fact that it will only consider offers that are accompanied by full payment, it seems unsatisfactory that the position is left unresolved. Aside from the legal position, this approach could leave taxpayers with an unacceptable level of uncertainty. In many cases, completion of the disclosure will have required the use of judgement and estimates, so being left in a position where it is not known whether these have been accepted could potentially be the cause of unnecessary anxiety.

Whilst some will have little sympathy for people who have not paid their taxes

historically, having made the decision to disclose these to HMRC it does not seem reasonable that such taxpayers are unable to obtain peace of mind having made the disclosure, and we are pressing HMRC to change its policy on this.

### *No immunity from prosecution*

There is no immunity from prosecution for disclosures made under the NDO, although HMRC has indicated that prosecutions where a full disclosure has been made are only likely to occur in exceptional circumstances.

This was also the case under the ODF. However, under the ODF, where advisors thought there may be a particular risk of prosecution, HMRC was generally prepared to agree that the Civil Investigation of Fraud (CIF) procedures (which offer immunity from prosecution) were used, whilst the disclosure still obtained the benefit of the fixed 10% penalty. This time around HMRC has said that CIF will not be allowed to be used in this way.

This makes it important that, in order to protect the taxpayer's position, a tax investigation specialist is consulted if it is

considered there are any features of a case that make it more likely HMRC will consider prosecution.

### *Summary*

The high quality of the information that HMRC is expected to receive from the banks as a result of the notices currently being issued means that anyone who might be affected by the current initiative cannot afford to ignore this opportunity to make a disclosure. Anyone failing to make a disclosure can expect HMRC to come calling sooner or later. When it does it will not only cost people more in penalties but the investigation process will be far more intrusive than making a disclosure under the NDO. In the most serious cases there is even the risk of prosecution.

It is also important that the decision to disclose is taken early. The short timescale for making the disclosure report means that accountants, for whom this falls at their busiest time of the year, will need all the time they can to be able to complete good quality disclosures.

## Key facts

## The New Disclosure Opportunity

- ▶ The NDO is an opportunity for people with undeclared tax liabilities connected with offshore banks to make a voluntary disclosure on simplified and favourable terms.
- ▶ Taxpayers are required to register their intention to disclose with HMRC between 1 September 2009 and 30 November 2009.
- ▶ Disclosure must be made by 31 January 2010 for paper disclosures, and by 12 March 2010 for online disclosures.
- ▶ A fixed penalty of 10% of duties payable will be charged. If the person disclosing had the opportunity to disclose under the 2007 ODF but failed to do so, the fixed penalty is 20% of the duties payable.
- ▶ No penalty is charged if the duties payable are less than £1,000.
- ▶ There is no immunity from prosecution under the NDO, although HMRC has suggested that this is extremely unlikely.

# Stop press

Despite stating that the NDO would be the “the last opportunity of its kind”, at the time of Under the spotlight going to press HMRC announced another similar arrangement, the Liechtenstein Disclosure Facility (LDF). This follows HMRC reaching a ground-breaking agreement with the Liechtenstein authorities on the sharing of information.

The terms of the LDF are more favourable than those of the NDO. Under the deal HMRC will only pursue tax going back up to 10 years as opposed to the normal 20 year time limit that applies to the NDO. The deadline for making a disclosure under the LDF is 31 March 2015 as opposed to the much tighter timescale of 12 March 2010 for the NDO.

Full details of how the LDF will work in practice are not yet available. However it is clear that for those with undisclosed UK tax liabilities connected with Liechtenstein accounts, this route for bringing their affairs up to date has significant benefits.

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