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Trustees and the Requirement to Correct Rule

May 2018

The Finance (No 2) Act 2017 requires disclosure of acts of historic non-compliance to HMRC by 30 September 2018. These provisions are known as the requirement to correct rule.

Trustees should be considering how they may be affected by this rule. In particular, the rule covers the obligations upon trustees to report and settle inheritance tax ten yearly charges.

Requirements

The rule applies when there has been a failure to comply with an outstanding offshore tax obligation and covers acts of non-compliance committed before 6 April 2017. The disclosure requirement applies to income tax, capital gains tax (including non-resident capital gains tax) and inheritance tax.

Non-compliance is broadly defined and includes failure to file a tax return and filing a return that contains an inaccuracy, as well as failure to settle a liability.

Timing

Action should be taken on or before 30 September 2018 (and the earlier the better in case other penalties are accruing).

Penalties for non-compliance

HMRC will apply a standard penalty of 200% of the relevant liability. They may then apply a reduction in view of mitigating criteria, such as whether HMRC was voluntarily notified of the failure to comply.

The penalty cannot be reduced below 100% of the liability.

In serious cases, HMRC may apply an additional penalty of up to 10% of the value of the related assets. Furthermore, if assets were moved offshore to avoid their details being reported to HMRC then there will be a further penalty of 50% of the standard penalty.

For serious cases of non-compliance, HMRC may 'name and shame' the culprit.

Defence

Trustees with a reasonable excuse for failing to make a required correction will face no penalty (but will need to settle any tax due and applicable interest).

In practice, it may be difficult to rely on this defence. For instance, relying on a third party without taking reasonable care is not a valid defence.

Advice

In certain cases, it will be possible to rely on a defence of reasonable excuse, after having relied in good faith on advice that turns out to have been wrong.

It is important that all advice that is to be relied upon is (i) given by someone with requisite expertise, (ii) addressed to the trustees, (iii) up to date and takes into account all relevant circumstances and (iv) not given by an 'interested person' (as defined in the HMRC guidance).

Summary

Trustees that are potentially affected by these provisions should take advice urgently due to the imminent deadline. The exchange of information that will take place shortly as a consequence of the Common Reporting Standard and other compliance regimes is expected to provide HMRC with the information required to establish non-compliance. In addition, taking steps to correct past non-compliance may interact with other regimes, for instance it may lead to an obligation to register a trust on HMRC's Trust Registration Service.

The penalty regime provides for a significant increase to the existing penalty system. There is no de minimis exemption (significant penalties can arise merely from a failure to file). For trustees, it is unlikely that any penalties arising as a result of their own non-compliance will be capable of being borne by the trust fund or covered by insurance.

The new naming and shaming provisions would also be likely to have a negative impact on professional trustees. For instance, it is possible that non-compliance will create issues with a trustee's local regulator.

It is therefore recommended that steps be taken to review any potential instances of non-compliance. A comprehensive review of historic actions may be required, but this is likely to be a worthwhile exercise in view of the consequences of non-compliance.

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