Written evidence submitted by Chartered Institute of Taxation (clauses 79 to 80 – offshore time limits) (FB02e)

Clauses 79 & 80 – Time limits for assessments involving offshore matters: IT, CGT and IHT

Executive summary

We support tough action against offshore tax evasion. Tax evasion is a crime which should be investigated and combatted. However, we are highly critical of the government's decision to extend tax assessment time limits significantly for *non-deliberate* offshore non-compliance. We do not believe a convincing case has been made to extend time limits in this way. There is additionally a lack of clarity around the boundaries of when the extended time limit will apply and the record-keeping obligations of affected taxpayers.

1. Overview

1.1. Clauses 79 & 80 increase the tax assessment time limit for non-deliberate offshore non-compliance to 12 years for Income Tax, Capital Gains Tax and Inheritance Tax by inserting new s36A into Taxes Management Act 1970, and new s240B into Inheritance Tax Act 1984.

1.2. The existing time limits for non-deliberate non-compliance are:

- 1.2.1. For errors despite taking reasonable care - 4 years after the end of the year of assessment (or for IHT the date of the chargeable transfer);
- 1.2.2. For errors where the loss of tax is due to careless behaviour – 6 years;
- 1.2.3. The increase in time limits is therefore 8 years and 6 years respectively.

1.3. The existing time limit of 20 years where deliberate behaviour has occurred remains unchanged.

1.4. The measure is effective from 6 April 2019, which means it will commence for years 2015/16 onwards in cases of error despite taking reasonable care (or for IHT, chargeable transfers taking place on or after 1 April 2015), and for years 2013/14 and 2014/15 in cases where the loss of tax is brought about by careless behaviour (for IHT, chargeable transfers taking place on or after 1 April 2013).

1.5. Consultation on this measure was begun at stage 2 (determining the best option and developing a framework for implementation including detailed policy design) of the government's tax consultation framework[1] rather than stage 1 (setting out objectives and identifying options). This was regrettable. Early stage consultation generally leads to better policy and the absence of it on this occasion may have contributed to the problems with this measure, which we set out in this representation.

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[1] Tax Consultation Framework, HM Treasury / HMRC, March 2011
https://www.gov.uk/government/publications/tax-consultation-framework

1.6. We note that the House of Lords Economic Affairs Finance Bill sub-committee has recently written to the Chancellor of the Exchequer[2] recommending that the measure is withdrawn from the Finance Bill, a call reiterated in their report published on December 4th.[3] Given the serious concerns we have raised about this measure during the consultation process (see below and in our consultation response[4]), their Lordships' recommendation has our full support. We particularly welcome their recommendation that the government "should start a fresh dialogue with representatives of tax professionals to consider how offshore tax matters can be managed more effectively. Any revised measure should be more proportionate and targeted." We are keen to work with government to achieve this.

2. Where is the evidence to justify this significant change?

2.1. Policy making should be evidence based. The argument put forward to justify such a major extension in offshore time limits - that it can take longer to establish the facts in cases involving offshore matters because it can be more difficult to access the information needed to understand the transactions - made more sense in the world as it was years ago, when knowing anything may indeed have been the tax authorities' key challenge, than is the case now. HMRC now have access to a huge amount of taxpayer data through FATCA and Exchange of Information Agreements with other jurisdictions plus powerful internal data analysis systems, so the key challenge now is likely to be a data analytical one. Public and media opinion, fuelled by recent data leaks, may not have caught up with this fundamental change but that is not a good reason for policy decisions to be made 'on the hoof'.

2.2. There has been no evidence presented to support the unprecedented conflation of normal assessing time limits (where reasonable care has been taken) and failure to take reasonable care. Currently for assessing beyond 4 years HMRC must demonstrate that the taxpayer failed to take reasonable care or engaged in deliberate behaviour. Merging offshore time limits sets a dangerous precedent and could potentially undermine and devalue compliant behaviour.

2.3. A 12-year time limit that can apply even where a taxpayer has taken reasonable care does not strike the correct balance between the public interest in collecting the full amount of tax calculated under the applicable rules, even where this relates to many years ago, and the right of individuals and businesses to finality in their tax position after a reasonable period of time if they engage honestly and openly with the tax authority.

Question: Why does the government think that 12 years is an appropriate length of time in both cases where reasonable care has been taken and in cases where it has not?

Question: Will the government publish the analysis carried out by HMRC on which they have based their decision to extend time limits in this way?

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[2] Draft Finance Bill 2018: interim conclusions and recommendations – letter dated 6 November 2018 https://www.parliament.uk/documents/lords-committees/economic-affairs-finance-bill/draft-finance-bill-2018/9%206%20Nov%20Chairman%20to%20Chancellor%20of%20Exchequer%20.pdf

[3] The Powers of HMRC: Treating Taxpayers Fairly, Economic Affairs Committee, 4th Report of Session 2017-19 - published 4 December 2018 - HL Paper 242 https://publications.parliament.uk/pa/ld201719/ldselect/ldeconaf/242/24202.htm

[4] HMRC Consultation: Extension of Offshore Time Limits Response by the CIOT 11 May 2018 https://www.tax.org.uk/sites/default/files/180511%20Extension%20of%20Offshore%20Time%20Limits%20-%20CIOT%20response.pdf

3. Safeguards

3.1. The legislation provides that the 12-year assessment time limit will not apply where HMRC has received "relevant overseas information" from another tax authority, "on the basis of which HMRC could reasonably have been expected to become aware of the lost tax" and "it was reasonable to expect" HMRC to raise the assessment within normal time limits (s36A(7) and s240B(7)). This safeguard is welcome (and an improvement on what was proposed both at consultation and in the draft legislation published in the summer).If Exchange of Information is working properly, we expect that it should be very unusual for HMRC not to have identified the lost tax and raised an assessment within normal time limits. Otherwise it still leaves considerable uncertainty as to when the extended time limits might apply or not. Furthermore, there is a legitimate public expectation that HMRC should deal with data it receives from taxpayers, overseas tax jurisdictions and elsewhere on a timely basis so as to comply with existing time limits.

Question: What circumstances fall into this category (where HMRC could reasonably have been expected to become aware of the lost tax and raise the assessment within normal time limits)? Can HMRC confirm whether, in practice, this is only likely to apply to overseas jurisdictions which attract a Category 3 territory classification (those that have not agreed to share any tax information with the UK)?

Question: We would imagine that taxpayers will usually be unaware of whether HMRC has received information from an overseas tax authority and when, and therefore will not know or have the evidence to challenge HMRC on these grounds. How will this safeguard therefore work in practice? Will there be some kind of disclosure requirement placed on HMRC in order that a taxpayer has access to information to be able to challenge HMRC?

Question: What assurances can be given that HMRC will deal with data received under Exchange of Information Agreements and other relevant overseas information in a timely and efficient manner?

3.2. The legislation also provides that the extended time limits will apply to lost tax involving an "offshore transfer" only where the transfer has made the lost tax "significantly harder to identify" (s36A(1) and s240B(1)). This is explained further in s36A(6) and s240B(6) to mean cases where HMRC was "significantly less likely to become aware of the lost tax" or "HMRC was likely to become aware of the lost tax only at a significantly later date".

This sub-clause is new (i.e. it was not in the draft Finance Bill published in the summer). "Significantly" is not defined, but we understand from HMRC that the new wording is intended to narrow the circumstances when the extended time limits will apply to cases of "offshore transfers" where it is difficult for HMRC to understand what is going on, and that it will be a question of fact (rather than of motive) whether the lost tax is harder to identify or not in any particular case. This is welcome as it will provide greater certainty to taxpayers over when the extended time limits will apply.

Question: When would a transfer make the lost tax "significantly harder to identify"? For example, would it be more likely to involve a transfer of funds to a non-transparent/non-CRS overseas jurisdiction rather than to a jurisdiction which has signed up to exchange of information? Or involve a transfer to a structure that means it takes longer to uncover the beneficial ownership of income because it has been sent up in a highly complex and non-transparent way?

If this is the case it is close to what we suggested when we responded to the original consultation[5]: that consideration might be given to applying the extended time limits only to offshore matters involving those jurisdictions which attract a Category 3 territory classification (those that have not agreed to share any tax information with the UK).

Question: Does this means that in practice, s36A(4) “offshore transfer” will only apply in a limited number of cases?

Question: Will HMRC be producing guidance to help taxpayers understand the scope of this provision?

4. Record keeping

We are very concerned about the impact this measure will have on record keeping obligations. This measure will mean that many taxpayers will consider it necessary to keep records of offshore matters for 12 years against the risk that they have not paid the right UK tax despite taking reasonable care. This is a big increase on the current length of time that legislation dictates records must be kept for and will not be attractive from an international competitiveness perspective. The additional costs of keeping records for an extended period were not taken into account in the impact assessment published in July 2018 which simply stated that, “*This measure is expected to have a negligible impact on business admin burdens as statutory record keeping requirements remain unchanged*” and “*Organisations will need to determine how long they should hold onto information in light of the new time limits*”.

Question: There are no changes being proposed to existing statutory record keeping rules, so what will happen if a taxpayer who becomes subject to extended time limits has legitimately destroyed relevant records? Guidance (i.e. practical points for taxpayers / businesses / agents) on how record-keeping might be affected by the changes is needed.

5. Equality and fairness

There has always been equal treatment so the ability of the state and the taxpayer to go back and correct errors is equal; it was six years, it became four. This measure breaks that so if tax is underpaid even without any fault by the taxpayer the state can recover it, but if tax is overpaid the state does not have to repay it. That is wrong in principle.

Question: Will the government consider extending the taxpayer’s ability to make a claim?

6. The Chartered Institute of Taxation

6.1. The Chartered Institute of Taxation (CIOT) is the leading professional body in the United Kingdom concerned solely with taxation. The CIOT is an educational charity, promoting education and study of the administration and practice of taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. The CIOT’s work covers all aspects of taxation, including direct and indirect taxes and duties. Through our Low Incomes Tax Reform Group (LITRG), the CIOT has a

[5] HMRC Consultation: Extension of Offshore Time Limits. Response by the CIOT 11 May 2018. https://www.tax.org.uk/sites/default/files/180511%20Extension%20of%20Offshore%20Time%20Limits%20-%20CIOT%20response.pdf

particular focus on improving the tax system, including tax credits and benefits, for the unrepresented taxpayer.

6.2. The CIOT draws on our members' experience in private practice, commerce and industry, government and academia to improve tax administration and propose and explain how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries. The CIOT's comments and recommendations on tax issues are made in line with our charitable objectives: we are politically neutral in our work.

6.3. The CIOT's 18,000 members have the practising title of 'Chartered Tax Adviser' and the designatory letters 'CTA', to represent the leading tax qualification.

The Chartered Institute of Taxation
6 December 2018