Response from ICAS to the HMRC Consultation

‘Tackling offshore tax evasion: A new criminal offence’

30 October 2014
Tackling offshore tax evasion: A new criminal offence

About ICAS

1. The Institute of Chartered Accountants of Scotland (ICAS) is the oldest professional body of accountants. We represent over 20,000 members who advise and lead businesses. Around half our members are based in Scotland, the other half work in the rest of the UK and in almost 100 countries around the world. Nearly two thirds of our members work in business, whilst a third work in accountancy practices. ICAS members play leading roles in around 80% of FTSE 100 companies. ICAS is also a public interest body.

General comments

2. ICAS welcomes the opportunity to comment on the consultation ‘Tackling offshore tax evasion: A new criminal offence’, issued by HMRC on 19 August 2014. ICAS representatives were also grateful to HMRC for meeting with them to discuss the consultation, when the details of the consultation were discussed. This paper is restricted to general comments.

3. ICAS agrees that a taxpayer has a responsibility to contribute the right amount of tax to the public purse but, equally, the state has a responsibility to ensure that the tax is assessed correctly and collected in a manner that is clearly understood and in accordance with the law.

4. The consultation document requests views on the design of this offence, a new strict liability offence of failing to declare taxable offshore income or gains, which means that it is not necessary for the court to ascertain the state of mind of the defendant before convicting. However, before giving views on the design, ICAS wishes to emphasise that its members are not in favour of introducing a strict liability criminal offence for failure to declare taxable offshore income or gains. There are a number of reasons for this, including:

   - A strict liability offence is one that applies regardless of intent so, generally, it tends to be used where the law is clear and an offence may endanger someone, such as driving offences or firearms breaches. ICAS does not believe that this is the same position when there is a failure to report a tax liability.
   - Dependent on the detail and intricacies of establishing the correct residence position, it may not necessarily be easy for the taxpayer to have established his correct tax position and whether he has an offshore tax liability to report. Cases where significant dispute resolution mechanisms are required to establish preliminary factual matters, such as whether the tax payer is a UK resident, should not result in a strict liability criminal offence.
   - It is not always clear cut who is responsible for any offshore tax evasion, particularly if there has been the provision of advice, or in cases involving inheritance tax.

5. ICAS also considers that if HMRC wishes to collect outstanding tax, the success rate may be higher using a civil, compliance route rather than the more confrontational position that evaders may adopt when faced with the prospect of criminal offences. Furthermore, if a voluntary disclosure route is to be effective there needs to be a clear exclusion for this from the strict criminal liability.

6. It would be helpful if HMRC increased awareness amongst the tax paying population of potential tax obligations, for example, when someone owns a property overseas. All too frequently those with undeclared offshore assets or income genuinely believe that they do not need to disclose it.

7. Collecting tax from offshore income and gains will be maximised by a consistent on-going message about the need to declare all sources. Threats of criminal proceedings are unlikely to be effective with the serious evaders; they are inappropriate with the
inadvertent non-taxpayers. There is a risk that introducing a strict liability offence may negatively impact those who make a genuine mistake rather than the serial offenders who may continue to evade regardless of the offence. It is not the offence that influences serial evaders’ behaviour: there is a need for HMRC to convince people that they will be caught.

8. Consideration should be given to the outcome of the Smith Commission on further devolved powers. For example, if income tax is fully devolved then it would be expected that responsibility for this tax, including offences for non-payment, may transfer to Revenue Scotland.

Scope of the offence

9. The proposal to introduce the new criminal offence relating to income tax and capital gains tax is noted. Extending the offence to inheritance tax would add further consistency. However, inheritance tax is more complex due to the various actors at play including executors, beneficiaries and the deceased. It may therefore not be appropriate to apply strict liability to inheritance tax especially as these actors may not know what the deceased has or has not declared. As discussed in paragraph 3.5 in the consultation paper there are also the added complexities in IHT lifetime charges to factor in.

10. Whilst simplicity is attractive and therefore the policy should be directed at the main areas of concern, it is the case that loopholes can be created when there are distinctions. Because of this, problems may be created if the new criminal offence is limited to certain types of income.

11. On balance it would be preferable to start with income tax and capital gains tax, and thereafter assess the effectiveness of the policy before considering the introduction of inheritance tax.

Proportionality and sanctions

12. A deminimis would be helpful, and should be included in statue, at a relatively high level. It should be referred to as, say, ‘a criminal threshold’ rather than a deminimis. This would assist in making the policy workable without criminalising smaller cases.

13. In relation to sanctions, a tax payer could be given a lower sanction in a criminal case than if HMRC had proceeded with a civil prosecution. Although there may be publicity reasons to proceed with a criminal prosecution, HMRC may generate more finances from civil suits. It is noted that many of the offences may fall within the remit of the Proceeds of Crime Act and that proceeding via this route may provide a better way than by imposing unlimited penalties.

Safeguards and defences

14. There should be a defence when a person demonstrates that they had taken reasonable care in conducting their tax affairs, although ‘reasonable care’ may time to become established.

15. A defence when a person demonstrates that they had sought and followed appropriate professional advice may also take some years to establish. Furthermore, HMRC should not create the impression that everyone should be taking professional advice in all circumstances. Therefore, a “reasonable care” test alone should be introduced which could encompass taking appropriate professional advice.