

TAX INVESTIGATIONS WORKSHOP

Date Saturday 18 May 2013



Topics

- New penalties regime
- Discovery assessments
- Time limits for assessments
- HMRC information notices
- Data Protection Act issues (Quickly)
- Disclosure Facilities

“New” Penalties Regime

The “new” error penalty regime

- Penalty regime introduced by Schedule 24 FA 2007. Applies to any accounting period etc beginning after 31 March 2008, for returns due to be filed after 31 March 2009.
- The regime focuses on the behaviour of the taxpayer,
 - ☐ Mistake despite taking reasonable care
 - ☐ Careless
 - ☐ Deliberate but not concealed
 - ☐ Deliberate and concealed
- Fixed ranges of statutory penalties
- HMRC define ‘carelessly’ as without reasonable care and equate this to negligence as per the old penalty regime
- Percentage reductions for disclosure, but lowest penalties are for unprompted disclosure only

When is a penalty chargeable?

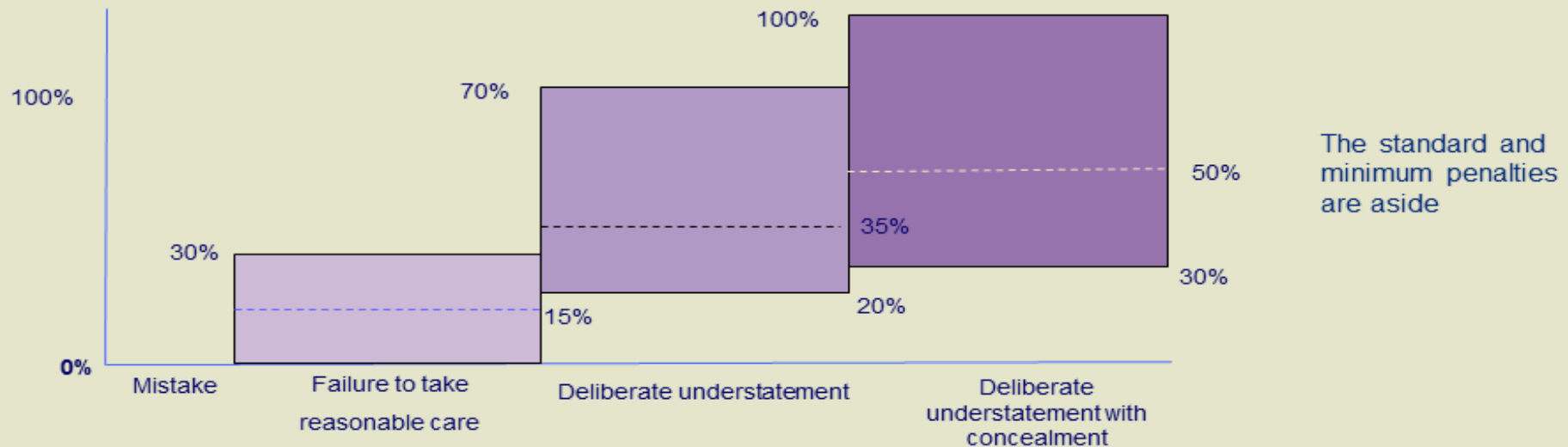
- Where a person gives HMRC an inaccurate return or other document, which satisfies the two conditions below:
 1. the inaccurate document either amounts to or leads to
 - an understatement of a person's liability to tax, or
 - a false or inflated statement of a loss, or
 - a false or inflated **claim** to repayment of tax, and
 2. the inaccuracy was careless, or deliberate

HMRC Behaviour Policy

Behaviour based

Reward early disclosure - prompted/unprompted

Broadly, when HMRC enquires, it is 'prompted' as opposed to a voluntary disclosure before any HMRC enquiry which is 'unprompted'.



Quality of disclosure

- Standardised penalties, reduced by 'Quality of disclosure'
- The mitigation is based on Quality of disclosure but the % reduction is limited to the difference between Standard and Minimum penalties
- Quality of disclosure focuses on : 'telling' 'help' & 'access':

A person discloses an inaccuracy or a failure to disclose an underassessment by:

- (a) **telling** HMRC about it,
- (b) giving HMRC reasonable **help** in quantifying the inaccuracy or under-assessment, and
- (c) allowing HMRC **access** to records for the purpose of ensuring that the inaccuracy or under-assessment is fully corrected

Deliberate behaviour – HMRC view

“A&B Ltd, a large company with a substantial advertising budget, does not have procedures to identify the entertaining element of advertising costs. So any expenditure on advertising is included in full in the advertising account, with no way of cross-checking how much of the expense relates to disallowable entertaining.”

- HMRC’s view:

“This would at least indicate failure to take reasonable care and could be shown to be deliberate. A&B Ltd’s basic systems and procedures are inadequate to give appropriate levels of assurance.”

Although this is a company example it is not difficult to imagine similar scenarios for individuals (e.g. allowable expenditure for CGT purposes)

Some from the latest 'Name and Shame'

| Name | Business, trade or occupation | Address | Penalty amount | Total amount of tax/duty on which penalties are based | %age |
|--------------------------------------|---|--------------------------|----------------|---|-------|
| Roofseal GRP Products Ltd | Supply Roofing Products | 6 Humber Street, Grimsby | £22,413 | £53,365 | 42.00 |
| Mr Philip Thompson | Road Haulage | County Antrim | £25,361 | £38,138 | 66.50 |
| Serkan Gokmen | Kebab Shop | City Rd, Peterborough | £21,336 | £42,041 | 50.75 |
| James Joseph Farmer | Painter/ Labour provider | Belfast, | £132,193 | £222,173 | 59.50 |
| Mr Euan Anderson and Isobel Anderson | Public Bar & Food Sales | Ayrshire | £51,859 | £77,984 | 66.50 |
| Mr Scott Johnson | Public House | Manchester | £15,773 | £25,753 | 61.25 |
| G S Services London Ltd | Construction Labour Supply | North Finchley, London. | £356,220 | £508,887 | 70.00 |
| Carraroe Construction Ltd | General Construction | West Norwood, London, | £75,716 | £139,568 | 54.25 |
| Alexander Black Recruitment Ltd | Permanent and Temporary Recruitment | London | £66,561 | £111,189 | 59.86 |
| Mr Mohammed Atiq Mir | Tandoori Restaurant and Takeaway | Blackpool | £19,201 | £34,288 | 56.00 |
| Paymaster Ltd | Labour provider | Birmingham | £1,115,481 | £1,991,931 | 56.00 |
| EU Oil Ltd | Wholesale Petroleum and Petrol products | Harlow, Essex | £719,212 | £1,053,791 | 68.25 |
| Westnew Management Ltd | Manage Real Estate | Tyne & Wear | £135,364 | £209,056 | 64.75 |

Penalty applied to the 'PLR'

- Concept of Potential Lost Revenue ("PLR")
- Where tax due (or erroneous repayment claim) it is simply the tax due (or over-claimed)
- But- Group Relief and Section 419(4) relief now ignored-
- And there can be a penalty where no tax due
 - In loss cases $PLR = 10\%$ of the loss. Not just Corporates - Consider Farmers, property letting, Capital Losses (shares with negligible value)
 - In delayed payment cases $PLR = 5\%$ of the adjustment per year of delay

Suspended Penalties and the £54 million mistake

- Suspension of penalties
 - careless inaccuracy only
 - agreement of corrective actions
 - can only apply to matters that can be repeated – Correction – HMRC may only suspend if condition of suspension would help the Person to avoid becoming liable to further penalties for careless inaccuracy
 - period of suspension may not exceed two years (from date of notice)
 - a suspended penalty becomes payable if during the period of suspension the taxpayer becomes liable for another penalty for careless inaccuracy – **No appeal**
 - penalty only cancelled (in part or whole) if all conditions of suspension complied with

Penalties for Failure to Notify

- Failure to notify
 - Penalties applying for accounting periods ending on or after 31 March 2010
 - 3 types of failure to notify (The potential lost revenue (PLR) from a failure to notify chargeability for corporation tax is the amount of tax that is unpaid 12 months following the end of the accounting period)

| Type of Failure | Unprompted Disclosure | Prompted Disclosure |
|---|-----------------------|---------------------|
| Non-Deliberate (disclosed within 12 months) | 0% - 30% | 10% - 30% |
| Non-Deliberate (disclosed after 12 months) | 10% - 30% | 20% - 30% |
| Deliberate | 26% - 70% | 25% - 70% |
| Deliberate and Concealed | 30% - 100% | 50% - 100% |

HMRC errors in application of penalties

- Confusion of old regime and new regime
- Consideration of prompted and unprompted in old regime
- (Old regime, prompted can still be zero – 20% disclosure, 40% cooperation, 40% size and gravity)
- Failure to consider suspension of penalties and
- In contrast, suggestion that because penalty is to be suspended, no need to argue
- Failure to notify – Can only apply if a return has not been issued
- If Return issued but not submitted, failure to submit Return but not failure to notify.
- If Return submitted but income/source omitted, penalty for incorrect Return
- Unwillingness to accept the concepts of innocent error or ‘careful’ error

Discovery Assessments

Discovery

Section 29 TMA 1970

Where the taxpayer has made and delivered a return ...he shall not be assessed ...unless one of the two conditions mentioned below is fulfilled.

(4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.

(5) The second condition is that at the time when an officer of the Board—
ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment;
or informed the taxpayer that he had completed his enquiries into that return,
the officer ***could not have been reasonably expected***, on the basis of the information made available to him before that time, ***to be aware of the situation...***

Limitations

- HMRC Statement of Practice 1/06
- The authority to make a discovery assessment is given by S29 TMA 1970 (ITSA), Para 41 Sch 19 FA 1998 (CTSA). In all cases, the relevant requirement for the purposes of this Statement is a discovery "that an assessment to tax is or has become insufficient".
- Mere suspicion that an assessment may be insufficient is not adequate grounds for making a discovery assessment.

HMRC Practice

- Assess and let taxpayer argue at Tribunal
- Tribunal considers merits of the assessment before validity
- Potentially swayed by amounts
- Note interconnection of behaviour to both time limits and penalties
- Double incentive for HMRC to argue careless/deliberate

Defence

- Quality of disclosure – White space, in return, documents, accounts, other information – inhibits HMRC's ability to 'discover'

Time Limits For Assessments

Income tax assessment time limits (Sections 34 & 36 TMA 1970, Schedule 39 FA 2008)

| Assessment | Time Limit |
|---|--|
| Discovery assessment where loss of tax not due to careless or deliberate behaviour (note the “white space” disclosure exception continues as before) | 4 years from the end of the year of assessment/accounting period. Previously 6 years; reference to fraudulent or negligent conduct replaced with careless or deliberate behaviour |
| Discovery assessment where loss of tax due to careless behaviour of person/company or agent | 6 years from the end of the year of assessment/accounting period. Previously 21 years; reference to negligent conduct replaced with careless behaviour |
| Discovery assessment where loss of tax due to: (1) deliberate behaviour of person/company or agent; (ii) <u>failure to notify chargeability</u> ; (iii) failure to disclose under DoTAS (Disclosure of Tax Avoidance Schemes) | 20 years from the end of the year of assessment/accounting period. Previously 21 years; reference to fraudulent conduct replaced with deliberate behaviour |

HMRC Information Notices

HMRC Information Powers (Schedule 36 FA 2008)

- Power to check a taxpayers '**tax position**'
- 'Taxpayer notices' can be issued to taxpayer or third party
- NB 3rd party can now be asked for *information* as well as documents
- New power to enter business premises to inspect records and assets
- Inspection power re domestic residences used for part business purposes
- No right of appeal against request to produce statutory records
- Visits to business premise may be unannounced

And also

- Pre-Return checks (Compliance Handbook 205330) – real time checks into tax planning or avoidance schemes as they are being developed or implemented

A “Kitchen Sink” Request (Corporate example but the same principles apply...)

I wrote to you on [redacted] to ask for documents and information to help me check your tax position. I think the documents and information are reasonably required for the purpose of checking your tax position because I am not currently satisfied that the transactions undertaken as part of Project [redacted] do not give rise to a tax liability under the arbitrage legislation of S24-S31 Finance Act 2005/Sch3 and/or S441 Corporation Tax Act 2009. The information provided in your letter of [redacted] was not sufficient and the documents and information still required is listed below and overleaf.

Schedule

***Documents or information**

1. All legal documents brought into existence to give effect to the transactions forming all or part of the Project [redacted] restructuring scheme (the scheme).
2. All material from advisors or shown by advisors, promoters or intermediaries in connection with all aspects of the scheme including those from the first identification of the issue of excess cash accumulation to the final implementation of the scheme.
3. Internal (including US personnel) presentation material.
4. Copies of Board meeting minutes which refer to the scheme or the cash accumulation problem or other factors which led to the scheme from 01 April 2008 to 20 November 2009 together with Board briefing papers and correspondence and documents that were used in putting those papers together or relating to the contents of those briefing papers.
5. Planning documents including the Scheme “Bible”

And it goes on...

6. E mails & any other correspondence & meeting or telephone notes, for the period from the first identification of the issue of excess cash accumulation to the final implementation of the scheme, between any party involved in the restructuring referring directly or indirectly to any transactions, including internal and external correspondence with finance and tax advisors and any internal departments. Please specifically include correspondence from or to the following people,

as well as any other people who were contacted in connection with the scheme.

7. An analysis of the cash and profits benefits of the UK acquisitions under the scheme.

8. A full tax analysis.

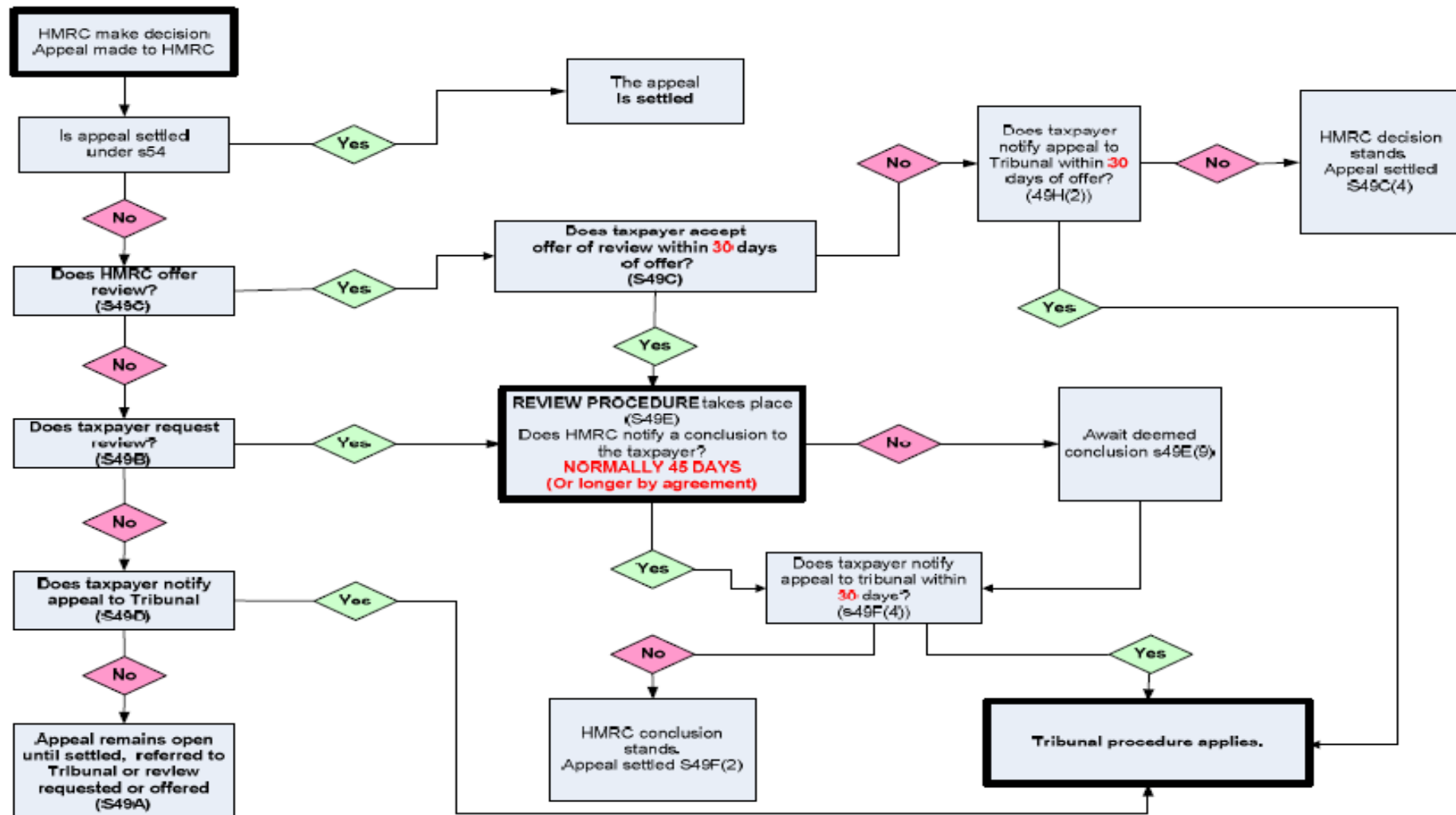
9. Scheme yield/cost projections for the UK

10. A copy of the Luxembourg Tax ruling which was obtained when the Luxembourg companies were established as part of the scheme.

11. Identify which staff obtained bonus payments in relation to the restructuring scheme and provide details of all bonus payments paid.

*'Document' means 'anything in which information of any description is recorded'. This includes but is not limited to any paper record or records held on any computer, on magnetic tape, optical disk (CD-ROM/DVD), hard disk, memory stick, flash drive, floppy disk or other recording media.

Appeals Process



Some (but not all) possible grounds of appeal

- Possession or Power
- Relevant to the determination of the tax position
- Reasonably required
- Unduly onerous – both in amounts required and time for provision
- Need to review and redact
- But beware the war of attrition – HMRC will win

DATA PROTECTION ACT ISSUES

(Read examples at your own leisure)

Compare and Contrast

| Tax Legislation | Data Protection Act 1998 (DPA) |
|---|--|
| <p>HMRC can require taxpayers (individuals, trusts, partnerships, companies) to provide documents and information</p> | <p>The DPA inhibits the disclosure of 'personal' and 'sensitive personal' data unless particular criteria are met (typically it has to be necessary and does not 'prejudice' the individual)</p> |
| <p>Failure to do so can result in the imposition of penalties</p> | <p>Failure to do so – i.e. disclosing information that should not be disclosed – can result in the imposition of penalties.</p> |
| | <p>Besides the financial cost there can be a high reputational cost because fines for offences are publicised</p> |

DPA Personal and sensitive personal

- **Personal data** – defined as data which relates to a living individual who can be identified from the data
- For example:
 - **Name;**
 - **Age;**
 - **Date of birth;**
 - **Home address**

Sensitive Personal Data - personal data consisting of information as to:

- racial or ethnic origin of the data subject;
- political opinions;
- religious beliefs or other beliefs of a similar nature;
- membership of a trade union;
- physical or mental health or condition;
- sexual life;
- the commission or alleged commission by him of any offence;
- court proceedings for alleged or committed offences.

A blue rectangular button with a white right-pointing triangle and the word "Skip" in white text.

Where's the conflict?

Example 1

- Client company runs substantial property portfolio. Mainly let but some sold each year. Oversight leads to omission of one sale. HMRC seek sight of the client property database to confirm no further omissions
- Client provides database. Columns showing full address and postcode of property, date property purchased, purchase cost and costs of purchase, date let, letting income, letting costs, rates, water rates etc, and, where sold, date of sale, sale price, costs of sale, name of purchaser(s), land registry number, stamp duty paid on sale, VAT paid on sale of commercial property etc etc
- **Spot the error that breaches the DPA?**
 - Data contains the name of the purchaser(s) and the address of the property purchased. As these are residential properties, these are 'living individuals who can be identified from the data'
 - Information regarding the names of the purchasers is not reasonably required by HMRC to determine the tax liability of the vendor

Where's the conflict?

Example 2

- HMRC undertaking full PAYE audit. Request full employee database
- Database shows name of employee, NINO, Date of birth, address and postcode, position in company, pay grade, gross pay, superannuation, benefits, tax deducted, tax code operated, NI deducted, employer's NI paid
- **Spot the error that breaches the DPA?**
 - Arguably, position in company and pay grade not reasonably required for determination of PAYE audit
 - Employee database also contains details of next of kin (to contact in case of emergency), nominated beneficiary in case of death, home telephone and personal mobile phone numbers (for emergency contact), Trade Union Membership (for automated deductions), and bank account sort code and account number for direct payment by BACS/CHAPS
 - Latter is clearly 'personal' (and in some instances sensitive personal) data, and cannot be said to be necessary for HMRC to check the tax position of the employer

HMRC Position (in case they aren't aware of it)

- Official HMRC instructions warn HMRC officers not to seek information that breaches DPA that is not relevant to the determination of tax liability
- See for example IHTM 09392 –
 - *“It is a **criminal offence** not only to disclose information to another person, but also **to ask for (procure) information from a data user, where it is known that disclosure would contravene the DPA**. The maximum penalty for contravening the non-disclosure provisions of the DPA is on summary conviction, a fine not exceeding the statutory maximum (currently £500,000) or on conviction in indictment, a fine that can be unlimited. (For the offence of procuring disclosure the information would have to be obtained. Asking for non-disclosable information could constitute an attempt to procure, which is also a criminal offence.)”*

Convincing HMRC

- **However**, these instructions and the way in which the DPA applies, are not always commonly understood within HMRC
- References to the DPA as preventing the provision of information are sometimes misinterpreted by HMRC as representing attempts to deny access to information
- It is important to stress to HMRC that they, as well as us, are under an obligation to comply with the DPA and it is therefore in everyone's interests that we do not provide (and they do not ask for) information in breach of it

Disclosure Facilities

Background

- 2007 – Offshore Disclosure Facility (ODF) (the one and only)
- 2009 – New Disclosure Opportunity (NDO) – from 1/9/09 to 30/11/09, extended to 4/1/2010 (The last chance)
- 2009 – Liechtenstein Disclosure Facility (LDF) – from 1/9/09 to 31/3/2015, extended to 31/3/2016 (The unique opportunity)
- Other sundry facilities
- March 2010 – Medical professionals – Tax health plan (THP)
- March 2011 - Plumbers, gas fitters and heating engineers (Plumbers Tax Safe Plan – PTSP)*
- Oct 2011 - Tax Catch Up Plan for tutors and coaches (TCUP)
- Feb 2012 – Electricians Tax Safe Plan (ETSP)
- And others we might have missed...
- Generic guidance available - <http://www.hmrc.gov.uk/campaigns/guide.pdf>
- * *Not to be confused with Polytetrafluoroethylene – PTFE – Plumber's tape*

The last opportunities?

HMRC document “No safe havens – Our Offshore evasion strategy 2013 and beyond” – envisages no more amnesties/disclosure facilities but a focus on building an ‘Offshore Evidence database’

“400 gigabytes of data is still being analysed but early results show the use of companies and trusts in a number of territories around the world including Singapore, the British Virgin Islands, the Cayman Islands, and the Cook Islands. The data also exposes information that may be shared with other tax administrations as part of the global fight against tax evasion.”

Isle of Man, Jersey, Guernsey disclosure facilities may be the last?

The choice of disclosure facility is not straightforward.

Any Questions?
Thank you for attending – we were



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