OLD SQUARE
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THE REQUIREMENT TO CORRECT OFFSHORE TAX NON-COMPLIANCE

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INTRODUCTION

1. For the most part penalty provisions are not a major concern for properly advised taxpayers. The law is complex, particularly so when dealing with offshore matters, and provided that the taxpayer takes a properly considered view of the law, there should be no question of penalties, even where that view of the law is ultimately determined to be incorrect. That is because the threshold of careless behaviour will not have been met (see para 1, Sch.24 FA 2007).

2. Unfortunately this orthodoxy no longer holds sway. Tax penalties are now imposed automatically in some instances: that is to say the penalty follows the tax liability unless a defence can be established. The penalties under the requirement to correct provisions in Schedule 18 Finance (No.2) Act 2017 are an example of this. The penalty applying to arrangements coming within DOTAS under para 3A, Sch.24 FA 2003 is another.

3. In both instances the penalty follow liability unless the taxpayer can positively establish a defence of reasonable excuse. A particular limitation on that defence is that reliance on advice from someone who assisted in implementing the arrangements, no matter how considered and proper that advice might be, is excluded from the assessment of whether or not there is a reasonable excuse.

4. This means that advisors must be increasingly vigilant not only to address issues of liability,

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but also the potential exposure to penalties in the event of a Tribunal taking a different view on liability. In the following I address the nature of the risk and the steps which can usefully be taken to address it.

THE PURPOSE OF THE REQUIREMENT TO CORRECT PROVISIONS

5. The purpose of the requirement to correct provision is "*to require those with undeclared offshore tax liabilities (relating to Income Tax, Capital Gains Tax or Inheritance Tax for the relevant periods) to disclose those to HMRC on or before 30 September 2018*" (HMRC Guidance on Requirement to Correct tax due on offshore assets of 16 November 2017 ("the Guidance").

6. The date of 30 September 2018 was chosen as the final date for corrections "*as this is the date by which more than 100 countries will exchange data on financial accounts under the Common Reporting Standard (CRS)*".

7. In one sense these provision provide- a logical conclusion to the strategy which began with the offer of various offshore disclosure initiatives. The legislation provides a final stick to demand compliance from those who have not responded to the carrot offered by the favourable disclosure opportunities.

8. The difficulty, as with so much legislation nowadays, is that these provisions go wider than catching those whose non-compliance is culpable and who could and should have rectified

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matters by now. Instead, it also impacts upon areas where the law is complex and there is a bone fide issue (which was not the target of the disclosure opportunities).

9. As the Guidance notes:

> *Anyone who owns or has an interest in assets held offshore or has had a source of income that is offshore, or has moved income or the proceeds of capital gains offshore is potentially affected.*
>
> …
>
> *If you have any doubt, you should review your UK tax affairs so that you can make any necessary correction by 30 September 2018.*

10. As noted below, it will of course be open to anyone facing a penalty under these provisions to raise a defence based upon the fact that such a penalty is unlawful. By targeting only offshore non-compliance the provisions operate in a discriminatory manner prohibited by EU law (which remains in point) and arguably also the ECHR.

11. Nonetheless, on the basis that prevention is often better (and cheaper) than a cure it will be sensible for anyone who has clients who have engaged in any sort of offshore tax planning to consider and address the potential exposure to a penalty under these provisions. In many instances that exposure should be limited. In others, as discussed below it will be appropriate to take a second opinion to ensure that a penalty cannot be imposed at a later date.

THE PENALTY FOR FAILURE TO CORRECT

12. A penalty applies to anyone who

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(i) has "relevant offshore tax non-compliance" at 5 April 2017; and

(ii) fails to correct that "relevant offshore tax non-compliance" by 30 September 2018.

(para 1, Sch.18 F(No.2)A 2017)

13. It can be seen that there is no fault requirement for the penalty to apply.

<u>What is relevant offshore tax non-compliance?</u>

14. Offshore tax non-compliance is concerned only with income tax, capitals gains tax (but not NRCGT payable by companies) and inheritance tax (para 12, Sch.18 F(No.2)A 2017) and only with non-compliance which was committed before 6 April 2017.

15. Non-compliance covers:

(i) errors or inaccuracies in documents to HMRC as a result of which tax is underpaid (corresponding to the penalty regime under Sch. 24 FA 2007);

(ii) a failure to notify HMRC of liability (corresponding to the penalty regime under Sch. 41 FA 2008); and

(iii) a failure to make returns (corresponding to the penalty regime under Sch. 55 FA 2009).

(para 8, Sch.18 F(No.2)A 2017)

16. An error or inaccuracy includes not only the situation where the tax is clearly due, but also one where the situation is unclear or arguable. This is clear from the Guidance:

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> *HMRC recognise that there are circumstances when a person takes advice in good faith but then has tax non-compliance that should be corrected because the advice was wrong.*

17. The offshore element requires that the non-compliance involves either:

    (i) an offshore matter (broadly it concerns a charge to tax on non-UK source income, assets or activities or on assets which become non-UK situate after a transfer of value), or

    (ii) an offshore transfer (broadly income or gains subject to UK tax are received or transferred offshore).

    It does not matter if it also includes an onshore matter, although any penalty is restricted to the offshore element.

    (paras 7 and 9 to 11, Sch.18 F(No.2)A 2017

18. Relevant offshore tax non-compliance requires three elements where:

    (i) Offshore tax non-compliance has not been corrected by 6 April 2017 (para 4, Sch.18 F(No.2)A 2017).

    AND

    (ii) The offshore tax non-compliance (or any part which remains uncorrected) involved a potential loss of revenue (para 5, Sch.18 F(No.2)A 2017).

    AND

    (iii) HMRC could have lawfully assessed the liability on the 6 April 2017 (for income tax and CGT) or 17 November 2017 for inheritance tax (disregarding any correction between 6 April 2017 and that date) if they were aware of the

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information missing as a result of any failure to correct non-compliance (para 6, Sch.18 F(No.2)A 2017).

19. It can be seen from this that it is only non-compliance concerning periods before 6 April 2017 which are covered by the potential penalty. As such, it is a matter of historical concern. It can also be seen that where matters have been corrected before 6 April 2017 the provisions are not in point, although where correction is only partial they will be in point to the extent of any non-correction.

Defence that an assessment could not be made

20. The condition that HMRC could have lawfully assessed if the information missing as a result of the failure to correct imports a highly relevant limitation, namely that unless HMRC could make a discovery assessment there will be no requirement to correct obligation.

21. In their Guidance HMRC acknowledge that this imports the time limits which apply to such assessments. That is clearly correct and an important limitation. Broadly it means a time limit of 4 years where there is no careless of deliberate behaviour, 6 years where there is careless behaviour and 20 years where there is deliberate behaviour (sections 34 TMA 1970 and 240 IHTA 1984).

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22. There are, however, significant other limitations in relation to discovery assessments for income tax and capital gains tax purposes (section 29 TMA 1970). A defence to a discovery assessment arises where the return was made in accordance with the practice generally prevailing. Furthermore, to issue a discovery assessment HMRC must show either (i) careless or deliberate behaviour or (ii) the information provided was insufficient to make an officer of HMRC aware of the loss of tax.

<u>How to correct offshore tax-non-compliance?</u>

23. Offshore tax non-compliance can be corrected in a number of ways including (para 13, Sch.18 F(No.2)A 2017):

    (i) Doing what should have been done in the first place;

    (ii) Using the digital disclosure service or another service provided by HMRC;

    (iii) Letting an officer of HMRC know in the course of an enquiry; or

    (iv) Using a method agreed with HMRC.

24. Correction cannot be made in a tax return for a tax year other than that for which the non-compliance relates to.

25. The correction not only requires that including the information which would have been provided had matters been dealt with properly but also requires the information which would have "enable or assisted HMRC to calculate the offshore tax due". This would seem to import a higher level of disclosure.

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EXTENSION OF TIME TO ASSESS UNDERLYING TAX

26. HMRC have until the later of the normal assessment date or 5 April 2021 to raise an assessment in respect of any tax that is subject to the requirement to correct (para 26, Sch.18 F(No.2)A 2017).

27. This extends the period of assessment for offshore tax by 4 years and applies regardless of whether the taxpayer would be liable for a penalty by reason of a failure to correct.

28. The taxpayer protections inherent in assessments generally will continue to apply, as they are incorporated within the test for relevant offshore non-complaince.

THE PENALTY

29. The standard penalty for failure to correct is a maximum of 200% and a minimum of 100% of the 'potential lost revenue' attributable to the offshore non-compliance (paras 14 and 16, Sch.18 F(No.2)A 2017).

30. The potential lost revenue is calculated in accordance with the relevant provisions under para 7 Sch.41 FA 2008 (for failure to notify chargeability), para 24 Sch.55 FA 2009 (for failure to provide a return) or paras 5 to 8 Sch.24 FA 2007 (for errors or inaccuracies).

31. The amount of the penalty can be reduced to a minimum of 100% of potential lost revenue where disclosure of relevant matters is made to HMRC (para 16, Sch.18 F(No.2)A 2017).

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The reduction must be made on a basis which reflects the quality – that is the timing nature and extent – of the disclosure.

32. Disclosure for these purposes includes telling HMRC about the matter, giving HMRC reasonable help, informing on any enabler (that is any person who encouraged, assisted or otherwise facilitated matters) and giving HMRC access to records to either the resolve the matter or identify enablers.

33. The penalty can also be reduced, stayed or compromised because of "special circumstances" (para 17, Sch.18 F(No.2)A 2017).

Asset based penalty

34. The provision of Schedule 22 FA 2016 providing for a further additional penalty of up to 10% of the assets connected to the failure to correct will apply where the tax involved exceeds £25,000 (para 27 Sch.18 F(No.2)A 2017).

Moving assets to avoid reporting

35. The penalty provisions under schedule 21 FA 2015 imposing an enhanced penalty where assets have been moved to prevent or delay HMRC from discovering a loss of tax also potentially apply to increase the penalty by a further 50% (para 28, Sch.18 F(No.2)A 2017).

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Double jeopardy

36. Conduct which has already been penalised under another provision or the criminal law will not be subjected to a further penalty as result of the requirement to correct (para 24, Sch.18 F(No.2)A 2017).

Publishing details

37. There is also provision for HMRC to publish details of serious defaulters where the lost tax exceeds £25,000 or there are 5 or more penalties and the taxpayer was aware that there was offshore non-compliance to correct (para 30 Sch.18 F(No.2)A 2017).

Assessment of the penalty

38. The penalty is assessed by notice which must state the relevant offshore tax non-compliance to which it relates and the period to which that non-compliance relates. The penalty is payable within 30 days (para 18(1) and (2), Sch.18 F(No.2)A 2017).

39. The penalty assessment is treated in the same way as tax assessment for procedural and enforcement purposes (para 18(3), Sch.18 F(No.2)A 2017). This applies for the purposes of an appeal ((para 20, Sch.18 F(No.2)A 2017). Notably, however, the Tribunal's powers on appeal include setting aside HMRC's decision by reference to public law principles (para 22, Sch.18 F(No.2)A 2017).

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40. After discovering non-compliance, HMRC have 12 months from the date on which an assessment of unpaid tax becomes final, or if there is no assessment from the date of ascertaining the amount of unpaid tax or correcting an inaccuracy, to issue the penalty. Notably, this is not 12 months from discovering non-compliance, but from having determined and quantified the impact of that non-compliance, which may take substantially longer.

THE REASONABLE EXCUSE DEFENCE

41. Liability to a penalty does not arise if the taxpayer can satisfy HMRC (or a Tribunal on appeal) that there is a reasonable excuse for the failure (para 23, Sch.18 F(No.2)A 2017). Establishing the availability of this defence will be central to evaluating exposure to a potential penalty.

<u>Meaning of reasonable excuse</u>

42. The meaning of reasonable excuse has been considered in a number of cases. A statement of what is required often referred is that if the FTT (Judge Redston) in *Perrin v HMRC* [2014] UKFTT 488 (TC) that the task of the Tribunal:

> *"… combines the tasks of judge and jury: we must decide whether "there is a reasonable excuse for the failure." We agree … that the correct way of doing this is to ask: "was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?": see Paras [99] - [100]*

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43. In addition, it has been noted that the fact that a reasonable taxpayer might have acted in a different way does not mean that it was unreasonable to adopt a different course (*Twaite v HMRC* [2017 IKFTT (TC) para 28 and *Trigg v HMRC* [2017] UKFTT 485 (TC) para 27).

44. The legislation includes provision making clear that insufficiency of funds is not a reasonable excuse unless attributable to events outside the taxpayers control, that where the taxpayer relied on someone to do something there cannot be a reasonable excuse unless he can show he took reasonable care and where a reasonable excuse ceases it can only be relied upon if the failure is remedied without undue delay.

Relying on advice

45. Where a taxpayer has acted on credible advice from reputable and suitably qualified person, that will generally amount to a reasonable excuse even where the advice subsequently proves to be wrong.

46. In the case of the requirement to correct, however, the legislation provides that (para 23(2)(d) Sch.18 F(No.2)A 2017):

> *For this purpose–*
>
> *…*
>
> *(d) reliance on advice is to be taken automatically not to be a reasonable excuse if it is disqualified under sub-paragraph (3).*

47. This means that potentially reasonable behaviour will be disregarded if it depends upon disqualified advice. The legislation states in this respect that:

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> *(3) Advice is disqualified (subject to sub-paragraph (4)) if–*
>
> *(a) the advice was given to P by an interested person,*
>
> *(b) the advice was given to P as a result of arrangements made between an interested person and the person who gave the advice,*
>
> *(c) the person who gave the advice did not have appropriate expertise for giving the advice,*
>
> *(d) the advice failed to take account of all P's individual circumstances (so far as relevant to the matters to which the advice relates), or*
>
> *(e) the advice was addressed to, or was given to, a person other than P.*

48. Advice will not be disqualified if a taxpayer takes reasonable steps to ascertain whether advice is disqualified and reasonably concludes that it is not (para 23(4) Sch.18 F(No.2)A 2017).

Advice disqualified because it is not addressed to the taxpayer

49. It ought to be possible to identify advice which is not addressed to the taxpayer or not given to him relatively easily. Care should be taken to confirm this as there may be circumstances where multiple parties are relying on advice which covers their circumstances, but which is only addressed to one of them.

50. A typical example where there might be an issue here would be advice which is given to trustees (e.g. on the existence of a capital payment) but which is relied on by a beneficiary on the basis that they analysis applies to him equally.

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Advice disqualified because of failure to have regard to individual circumstances

51. As regards advice taking account of all individual circumstances, , HMRC's Guidance makes the point that it may not cover the individual circumstances if the transaction is subsequently carried out in a different manner. That is likely to be a question of fact.

52. Further, where circumstances change so that the advice is no longer current, HMRC suggest that it will be caught by the requirement that it takes account of individual circumstances. This raises an important question as to whether such advice is caught by sub-para (3)(d) so that it is disqualified in its entirety, or whether it is simply a question of whether it provides a reasonable excuse in light of those change of circumstances (which it may or may not do). The HMRC Guidance appears to suggest the former, but the point would seem to be highly arguable in favour of the latter.

Advise disqualified for lack of appropriate expertise

53. It should be relatively straightforward to identify where a person does not have appropriate expertise for giving advice. HMRC accept that "*anyone who is a member of a UK-recognised legal, accountancy or tax advisory body will have the appropriate expertise to give advice on UK tax matters*". Subject to that, it would seem to be a question of fact based on the circumstances.

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Advice disqualified because it is provided by an interested person

54. A more problematic and potentially wider category concerns advice from 'an interested person'. While it might be thought that a professional lawyer or accountant providing dispassionate and informed advice to his or her client on an arm's length basis and without any conflict of interest could not be regarded as an interested person in relation to that advice. That is not the case. The very act of providing planning advice can arguably render the advisor an interested person, disqualifying any subsequent advice which might be received.

55. Central to this concern is the meaning of "an interested person" which is expanded beyond what the natural meaning of those words might suggests:

> *(5) In sub-paragraph (3) "an interested person" means, in relation to any relevant offshore tax non-compliance–*
>
> *(a) a person (other than P) who participated in relevant avoidance arrangements or any transaction forming part of them, or*
>
> *(b) a person who for any consideration (whether or not in money) facilitated P's entering into relevant avoidance arrangements.*
>
> *(para 23(5) Sch.18 F(No.2)A 2017)*

56. The Guidance states:

> *HMRC's view is that when considering who the interested person is, person includes a body of persons both corporate or unincorporate. It therefore follows that the interested person might be an individual, or an organisation such as a limited company, firm of accountants or a limited liability partnership.*

57. This would seem to be correct in context. It would, however, prevent a second opinion being provided by a different expert within the same organisation.

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58. Furthermore, once a person is an interested person he will remain such. As such, subsequent advice may also be disqualified (a point HMRC make in the Guidance).

What are avoidance arrangements?

59. It can be seen that this in turn depends upon the meaning of "relevant avoidance arrangements". Again, this is a term which covers substantially more than the natural meaning of the words would suggest.

60. Firstly avoidance arrangements are identified in the following manner:

> *(6) In this paragraph "avoidance arrangements" means arrangements as respects which, in all the circumstances, it would be reasonable to conclude that their main purpose, or one of their main purposes, is the obtaining of a tax advantage.*
>
> *…*
>
> *(9) In sub-paragraph (6)–*
>
> *(a) "arrangements" includes any agreement, understanding, scheme, transaction or series of transactions (whether or not legally enforceable), and*
>
> *(b) a "tax advantage" includes–*
>
> *(i) relief or increased relief from tax,*
>
> *(ii) repayment or increased repayment of tax,*
>
> *(iii) avoidance or reduction of a charge to tax or an assessment to tax,*
>
> *(iv) avoidance of a possible assessment to tax,*
>
> *(v) deferral of a payment of tax or advancement of a repayment of tax.*
>
> *(para 23(6) and (9) Sch.18 F(No.2)A 2017)*

61. This covers not only tax avoidance arrangements, but would seem to include tax planning of any kind.

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62. Although it is arguable that such a wide interpretation is at odds with (i) the penal context and (ii) the terminology of avoidance arrangements requires an exception for matters accepted by HMRC suggests that (given HMRC are not in the habit of accepting avoidance arrangements) it is properly to be construed very widely:

> *(7) But arrangements are not avoidance arrangements for the purposes of this paragraph if (although they fall within sub-paragraph (6))–*
>
> *(a) they are arrangements which accord with established practice, and*
>
> *(b) HMRC had, at the time the arrangements were entered into, indicated its acceptance of that practice.*
>
> *(para 23(7) Sch.18 F(No.2)A 2017)*

63. Helpfully the Guidance explains that HMRC take the view that this is somewhat wider than appears on first reading and covers any arrangements which HMRC have previously accepted:

> *There will be cases where HMRC have agreed the correct treatment for an issue (for example during the course of an enquiry, via a ruling or through discussion with a CRM).*
>
> *Provided there has been no material change to the relevant facts or legislation and that all relevant information requested at the time was provided, HMRC will accept that any returns subsequently submitted in line with the agreed treatment were made in accordance with established practice and the arrangements concerned will not be considered avoidance arrangements for the purposes of the RTC. This is in line with the acceptance of established practice in relation to advice from an interested person.*

HMRC Guidance on advice from an interested person

64. HMRC's Guidance on disqualified advice is helpful as it gives a number of useful examples. These are particularly in point given that para23(4) Sch.18 F(No.2)A 2017 provides that advice will not be disqualified if a person takes reasonable steps to address

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whether or not it is, and reasonably believes that it does not. HMRC's view of when advice is disqualified is clearly relevant to that assessment.

Arrangements which HMRC do not consider to be avoidance arrangements

65. Example 9 of the Guidance gives an example of tax advice which HMRC consider does not involve avoidance arrangements. The example concerns of wrong advice on domicile status followed by planning based upon the incorrect view that the taxpayer had non-UK domicile. The Guidance suggests that there is a reasonable excuse because it turned on the domicile advice and this was not disqualified advice:

> *It is important that the inaccurate advice related to Ian's domicile status but that the domicile status did not involve avoidance arrangements facilitated by the advisor. Ian did not take any steps to alter his domicile status based on the advice.*
>
> *In these circumstances his domicile status does not fall within the definition of avoidance arrangements. Although the subsequent steps do fall within the definition of avoidance arrangements, the advice relating to the avoidance arrangements was correct.*

66. It is helpful to note HMRC's view that advice is only disqualified to the extent that it relates directly to avoidance arrangements. That is helpful as it appears to introduce a further limitation.

HMRC view on disqualified advice given on an individual basis

67. A more concerning situation which demonstrates the wide nature of the disqualificaiton is given in Example 10:

> *Example 10 – disqualified advice given by an interested person*

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> *Peter wanted to structure his affairs to ensure he paid the minimum amount of tax required by the law. He approached a specialist firm who, after reviewing his circumstances, advised him to set up an offshore trust to hold some of his assets and investments.*
>
> *The firm also advised Peter on how to complete his tax return. Peter accepted the advice and instructed the firm to put the arrangements in place.*
>
> *Peter did not make a correction under the RTC because he believed, based on the advice he had received, that he had no correction to make.*
>
> *Some years later HMRC challenged Peter's return and after a lengthy enquiry established that more tax was due on the assets and investments in the offshore trust. Because of this Peter owed tax in relation to his offshore income for tax years 2013 to 2014, 2014 to 2015 and 2015 to 2016. Peter should have made a correction under the RTC.*
>
> *Although the advice was given by someone with the appropriate expertise and took account of all of his relevant circumstances, because it was advice concerning avoidance arrangements and was given by someone who facilitated the arrangements it is disqualified.*
>
> *The firm is an interested person and Peter cannot rely on the advice he received to show he had a reasonable excuse for his failure to correct.*

68. Although much turns on what is meant by "instructed the firm to put the arrangements in place" this is likely not an uncommon situation. Planning has been entered into on the basis that it works, but a penalty is potentially in point as a result of an enquiry some years later. Despite the actions of Peter plainly being reasonable in the circumstances, he is denied a reasonable excuse defence.

69. This example is pertinent not only as demonstrating the width of the potential penalty provisions but also the manner in which HMRC consider the restriction on reasonable excuse applies. It is not limited to the circumstances where a taxpayer who has entered a scheme relies on the generic advise provided to the scheme promoters and HMRC plainly do not intend to limit it in such a manner.

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70. In a subsequent related example advice of a second advisor was not disqualified in circumstances where:

> *"… after the arrangements had been put in place, Peter provided full details of the arrangements to another accountant and asked him to advise how he should complete his tax return.*
>
> *The accountant told him that he agreed with the advice given by the specialist firm and helped Peter complete his return accordingly".*

71. This demonstrates that HMRC (correctly) accept that a second opinion confirming the first can be relied upon.

When do avoidance arrangements become relevant avoidance arrangements?

72. Tax planning which is not an established practice accepted by HMRC becomes a "relevant avoidance arrangement" where in effect returns are incorrectly made on the basis that the planning worked to save tax:

> *(8) Where any relevant offshore tax non-compliance arose originally because information was submitted to HMRC on the basis that particular avoidance arrangements had an effect which they did not have, those avoidance arrangements are "relevant avoidance arrangements" in relation to that tax non-compliance.*
>
> *(para 23(8) Sch.18 F(No.2)A 2017)*

Participation in or facilitation of avoidance arrangements

73. If then, relevant avoidance arrangements covers tax planning on which a return has been based, the question then arises as to when a person has "participated in" or "facilitated P's entering into" the tax planning within (para 23(5) Sch.18 F(No.2)A 2017).

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74. As regards participation, that ought to be reasonably easy to identify and should go beyond advising in relation to the arrangements. It must involve involvement in the arrangements in come capacity.

Advising on arrangements

75. A more difficult issue is identifying when a person has facilitated the taxpayer in entering into the arrangements. At its widest, this includes tax planning advice which given in advance of the arrangements being made. Such advice was clearly given for a consideration, and to the extent that the arrangements would not have been adopted but for the advice it is arguable that it facilitated them.

76. That wide definition would, however, seem to go beyond the purpose of disqualifying certain advice. That purpose would seem to be directed at requiring advice to meet certain minimum standards before it is relied on by the taxpayer. It is also directed at those selling tax planning arrangements as a product in which they have a financial interest (and by extension may have interest in the taxpayer not obtaining independent and tailored advice).

77. In that context, facilitation would more properly seem to envisage doing something which enables the taxpayer to enter into the arrangements. Mere advice as to the tax consequences of the arrangements would not do that. On the contrary, specific tailored advice appears to be what the legislation is encouraging.

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78. Unfortunately HMRC's guidance on this point is ambiguous. None of the guidance expressly addresses an example where the advisor simply provides advice. Further HMRC state:

> *HMRC accepts that if a person gives all of the advice after all of the avoidance arrangements have taken place that advice cannot relate to the facilitation of those avoidance arrangements and will not be disqualified on the grounds of it being from an interested person (as long as the adviser did not participate in the relevant avoidance arrangements).*

79. This suggests that advice given before the arrangements are entered into can facilitate them. Elsewhere, however, HMRC appear to accept that planning advice could be relief upon in certain circumstances.

Drafting documents

80. Another issue is whether a person who has drafted transaction documentation or who has commented on such documentation has facilitated the arrangements. If the taxpayer could not have entered into the arrangements but for that documentation, it is difficult to see how this does not amount to facilitation.

81. A consequence of this is that any subsequent advice from that person would also be disqualified.

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A SECOND OPINION AS INSURANCE AGAINST A PENALTY

82. The consequences of advice being disqualified are potentially severe. A taxpayer who has acted perfectly properly may find that he or she is facing substantial penalties if the planning does not work. That is because he cannot rely on the advice and must show a reasonable excuse in some other way. While that is not impossible in any given case, it is much less straightforward than being able to point to considered advice of an expert.

83. A concern in this respect is that HMRC are now in a position to substantially raise the stakes in any enquiry. The consequences of a taxpayer losing will not only be that he or she must pay the tax once, but that a penalty of at least 100% will follow.

84. Nor can it be assumed that in the context of such an enquiry HMRC will take a narrow and reasonable view of the requirement to correct provisions. An increasingly prevalent win at all costs mentality suggests that all the weapons at HMRC's disposal will be used to reach an outcome which is satisfactory to HMRC.

85. In those circumstances, it will be sensible to take pre-emptive action to take the threat of a requirement to correct penalty off the table. This can be done by ensuring that the taxpayer has a reasonable excuse, most easily by demonstrating that the failure to correct was based upon advice which is not disqualified. That can most easily be done by a second opinion confirming the original advice and addressing any subsequent developments. (In that

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respect, the independent bar and Old Square Tax Chambers is ideally suited to offering assistance).

86. This is also in line with HMRC's Guidance:

> *Example 12 – further advice, not from an interested person (not disqualified)*
>
> *Ken approached a specialist trust company in 2011 and was advised that he could pay less tax if he set up a complex offshore structure involving trusts and companies.*
>
> *The specialist trust company was paid a commercial fee for the work setting up the structure. Ken did not tell his accountant about the structure because he was happy to rely on the advice from the trust company.*
>
> *In 2017, Ken decided to get a financial health check to make sure he did not need to make a correction under the RTC.*
>
> *He explained what had happened to his accountant and supplied all of the relevant information to him. The accountant said that the matter was not free from doubt but agreed that no tax was payable and that Ken had no need to make a correction.*
>
> *Sometime later HMRC found out about the structure and opened an enquiry. The matter was complex but eventually HMRC established that the structure did not successfully avoid tax and that further tax was due. Ken should have made a correction and hadn't. Ken had to pay the tax and interest that was due.*
>
> *However, HMRC accepted that because Ken had obtained, and followed, independent advice about the avoidance arrangements from someone with the appropriate expertise and the advice took account of all of his relevant individual circumstances he had a reasonable excuse for not making the correction and no FTC penalty applied.*
>
> *If Ken had relied solely on the original advice he would not have had a reasonable excuse as the advice would have been disqualified as it was given by an interested person because the specialist trust company was involved in facilitating the avoidance arrangements and was paid a fee for that work.*

87. This does of course raise a question as to whether such advice was "as a result of arrangements made between an interested person and the person who gave the advice" where the original advisor is involved in obtaining the advice, for example by instructing counsel on the client's behalf. HMRC have made clear in the Guidance that the will not take any point on this:

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> *HMRC will also not seek to argue that the new advice is disqualified because it is as a result of arrangements made between an interested person and the person who gave the advice.*

88. Where the advice is that no tax is due but that the matter is not entirely clear, that would seem to amount to a reasonable excuse for not making a correction.

89. HMRC suggest in the Guidance as an alternative that a disclosure can be made showing that no tax is due. The Guidance suggests that there should be a full explanation as to why any doubts arise.

90. This would not technically meet the requirements of the requirement to correct legislation, but HMRC state that provided that the information provided is correct a penalty will not be applied. That would seem to be permissible under the special circumstances discretion.

A FINAL DEFENCE – THE PENALTY IS UNLAWFUL

91. There is a substantial body of EU law establishing that while the UK has competency in relation to its tax code tax provisions cannot operate in a manner contrary to the provisions of the Treaty on the Functioning of the European Union. Brexit neither removes that legal obligation nor does it impact upon individual taxpayers' rights to rely on directly enforceable EU law rights.

92. Against that background it is surprising that the government would consider it suitable to enact legislation specifically aimed at those who carry on activities overseas.

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93. It may be that the view has been taken that since the provisions operate historically they cannot have restricted rights of establishment or rights to free movement of capital. If that was the view it ignores the case law to the effect that the provisions on freedom of establishment and free movement of capital give specific expression to the prohibition on discrimination (see e.g. Case C-385/12 *Hervis Sport* at para 25).

94. It accordingly follows provision which discriminates against those who have exercised treaty rights in the past cannot be compatible with those treaty rights. This provision would appear to do so as it imposes additional obligations and penalties on such persons which would not apply if they had not paid their tax onshore.

95. It is of course possible that the difference in treatment which the provisions effect can be justified on the grounds of ensuring effective fiscal supervision. Indeed, the CJEU accepted in Joined Cases C 155/08 and C 157/08 *X and E.H.A. Passenheim-van Schoot* [2009] STC 2441 accepted that extended periods of recovery could be justified when dealing with overseas tax liabilities. It is, however, difficult to see in the light of the CJEU's reasoning that this justification extends to the imposition of significant penalties simply because of the offshore element (see in particular paras 74, 75 and 83).

CONCLUSION

96. The requirement to correct provisions in Sch.18 F(No.2)A 2017 represent a significant risk for any taxpayer who has undertaken offshore tax planning. In advance of 30 September

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2018 steps should be taken to review exposure to a penalty under the code, and if necessary a correction should be made.

97. In assessing the application of the provisions there are three main defences to bear in mind:

(i) HMRC are barred from issuing a discovery assessment because of either time or previous disclosure.

(ii) The is a reasonable excuse for not making a correction.

(iii) The penalty is unlawful as a matter of EU law.

98. In a genuine planning situation the most straightforward way of addressing the risk of a penalty will be to ensure that there is a reasonable excuse. That can be done by showing reliance on competent advice addressed to the taxpayers needs. Care needs to be taken, however, to ensure the advice is not disqualified. In many cases it will be sensible and appropriate to obtain a second opinion.

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3 May 2018
(amended to add para 63 on 9 May 2018)