

UK Tax Updates and Recent HMRC Trends

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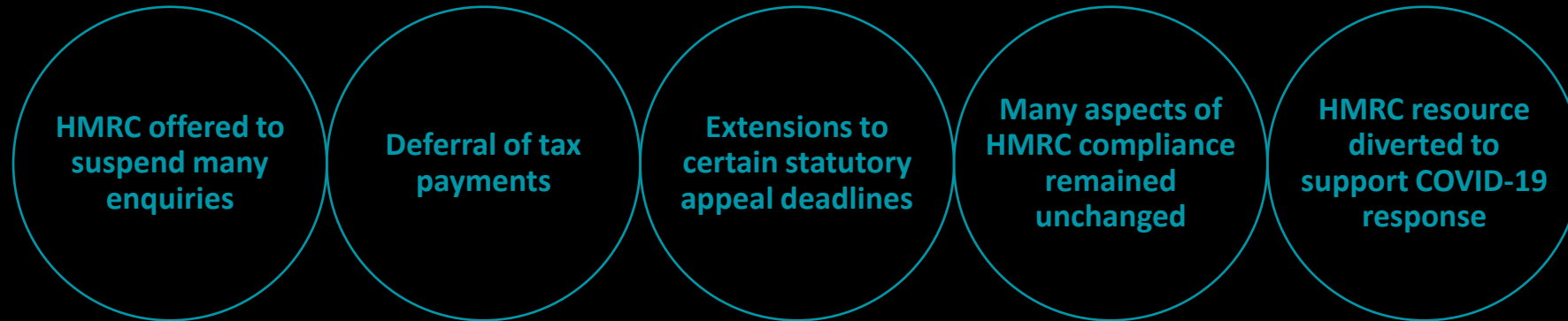
Tax Controversy – Update on HMRC information powers & current enquiry trends

Michael Pape

10 November 2020

Tax Controversy

HMRC during COVID-19



COVID-19 and HMRC

Learning from history

- The rise of the “responsible tax agenda” in the media and public domain
- Introduction of FATCA and the Common Reporting Standard
- Cross-border policy making, e.g. beneficial ownership registers; Belgium copies CCMs
- Panama Papers; Paradise Papers; tax leaks
- Greater regulatory controls: Senior Accounting Officer; Corporate Criminal Offence
- New civil and criminal offences for promoters of avoidance & enablers of evasion
- Tax rulings in the Courts broadly uphold HMRC challenges to tax mitigation
- HMRC in an age of austerity

Tax Controversy

Proposed Amendment to Schedule 36 Powers

INFORMATION AND INSPECTION POWERS

PART 2

FINANCIAL INFORMATION NOTICES

Power to obtain information and documents from Financial Institutions

4A(1) An officer of Revenue and Customs may by notice in writing require a financial institution—

- (a) to provide information, or
- (b) to produce a documents,

if conditions A and B are met.

(2) Condition A is that the information or document is, in the reasonable opinion of the officer giving the notice, of a kind that it would not be onerous for the institution to provide or produce.

(3) Condition B is that the information or document is reasonably required by the officer –

- (a) for the purpose of checking the tax position of another person whose identity is known to the officer (“the taxpayer”), or
- (b) for the purpose of collecting a tax debt of the taxpayer.

(6) A financial information notice must name the taxpayer to whom it relates.

(7) An officer of the Revenue and customs-

- (a) must give a copy of the financial institution notice to the taxpayer to whom it relates, and
- (b) must give the taxpayer a summary of reasons why an officer of the Revenue and Customs requires the information and documents

Tax Controversy

Financial Information Notices

Scope

- Applies to third party Notices issued to Financial Institutions and requests for information about their customers for the purposes of domestic or overseas tax investigations.
- There is no requirement to seek taxpayer's agreement or First-tier Tribunal (FTT) approval before it is issued.
- There is no right of appeal against a FIN but it can be challenged by way of Judicial review on the grounds of unreasonableness. This is however a costly process.

Taxpayers' safeguards

- **FINs** can only be used where the information or document being requested would not be onerous for the financial institution to provide or produce. All notices must be approved by an authorised officer.
- HMRC must give a copy of the FIN to the taxpayer together with a summary of reasons why the information is required. The identity of the taxpayer must be known to the HMRC officer issuing the notice.
- The usual safeguards in Part 4 of Sch 36 applies to FINs and HMRC will be required to report annually to Parliament on how it has used the new power, including the number of FINs which have been issued.

Old vs new

- Currently, HMRC's Sch 36 powers can only be used to check a person's tax position but the proposed amendment includes provisions that enables HMRC to request information through either taxpayer's notices, third parties notice or FINs for the purpose of debt collection.
- With the permission of the FTT, the conditions of naming, notifying or giving reasons for the FIN or third party notice to the taxpayer can be disapplied and the third party or financial institution can be forbidden from informing the taxpayer.

Tax Controversy

HMRC enquiry trends

More detailed enquiries

We expect HMRC's approach will now involve:

- A project based approach
- More detailed enquiries
- Quicker use of formal powers
- More robust behavioural negotiations

HMRC nudge letters

HMRC have issued a number of 'nudge letters' prompting taxpayers to check if they have paid the correct amount of tax, including on:

- Overseas income or gains
- UK investment income
- Sales of properties – Not PRR
- Benefits in kind
- ATED



Trust protections

2017/18 tax returns were the first to be submitted following the changes to the deemed-domicile provisions effective from 6 April 2017. We are seeing detailed enquiries as a result;

- Application of trust protections
- Tainting
- OIGs
- Underlying CRS data
- Domicile

Others

- 'Life events'
- Transactions, business exits, migration
- Opportunities for taxpayer engagement
- Drivers for enquiries
- High Risk Wealthy Programme



UK Trust Update: Trust Register 4MLD & 5MLD & Trust-to-Trust transfers

James Stevens

The Fourth Money Laundering Directive

4MLD

Became effective from 2017

Effects all trusts that have UK income which have UK tax liabilities (Income Tax, CGT, Inheritance Tax & Stamp Duty)

Effects all trusts with UK tax liability irrespective of where trustees are resident

Fulfils UK obligation under EU Fourth Money Laundering Directive.

The Fifth Money Laundering Directive – 5MLD

What is changing?

- UK is implementing the EU's Fifth Money Laundering Directive (5MLD).
- Means significant changes to the Trust Register (and to the trust registers of all EU Member States). The main changes are as follows:
 - All UK trusts will have to register whether or not they have UK tax liabilities.
 - Trusts already registered will have to provide some additional information about their beneficial owners.
 - Non-UK/EU Trusts will be required to register if they acquire UK real estate;
 - Non-UK/EU Trusts with at least one UK resident trustee that enter into a new business relationship with a UK professional service provider will be required to register;
 - Third parties with a "legitimate interest" will be able to access information on the Trust Register.
 - Trustees required to supply trust's registered beneficial ownership information to any service provider with which they enter into a business relationship.
 - Service providers will have to report any discrepancy between the information on the Register and the information obtained as part of the due diligence obligations.
 - Trustees will only have thirty days from the creation of a trust or from the date of any changes to the beneficial owners of the trust to report the relevant information.

Which Trusts have to register?

UK Trusts

In principle, all UK trusts will have to register. However, the following categories of trust are excluded from registration:

- Trusts which comes into existence by operation of law. This would include for example trusts arising on intestacy, implied or constructive trusts and trusts created under a court order such as on divorce;
- Trusts relating to joint ownership of property (e.g. land or bank accounts) where the legal and beneficial owners are the same;
- Charitable trusts;
- Trusts holding pensions or life policies;
- Trusts which are required to meet statutory conditions in order to benefit from some beneficial status – for example trusts for vulnerable beneficiaries or employee trusts; and
- Certain commercial trusts – for example relating to bond issues or syndicated loans.
- No decision yet been taken as to whether bare trusts (including nominee arrangements) will be required to register.
- Further guidance will be forthcoming from HMRC

The underlying principles behind the exemptions are that either the information is already available as the trusts are required to register in some other way (for example pensions and charities) or that there is low risk of the trusts being used for money laundering or terrorist financing purposes (such as trusts involving joint ownership or those which are required to meet specified statutory conditions).

Trusts which have UK liabilities have registration requirement even if within one of the exempt categories

Which Trusts have to register?

Non-UK/EU Trusts

Non UK/EU Trusts that enter into a business relationship with a UK service provider (relevant person);

- Only applies if the trust has at least one UK resident trustee;
- Business relationship not defined in terms of duration - initial HMRC guidance suggests relationships with a duration of 12 months or more;
- Occasional or very limited business relationships outside the scope;
- Relevant persons – Financial Institutions, Credit Institutions, Audit, Accountancy & Insolvency providers, Tax Advisors, Independent Legal professionals, Trust & Company Service providers, Estate Agents, High Value Dealers, Casino's;
- Applies to "relevant transactions" – that is transactions that require the relevant person to undertake customer due diligence protocols;
- Regulations apply to Trustees of relevant trusts – not trustees themselves;
- A trust which has a UK resident trustee will still be non-UK resident for tax purposes if there is at least one non-UK resident trustee and the settlor was neither resident or domiciled in the UK when funds were contributed to the trust.
- A non-UK resident trust which has at least one UK resident trustee will be required to register if it enters into a new business relationship with a UK service provider after the changes come into effect unless the trust is resident (and therefore required to register) in any EU member state.
- Trusts that register in another EU state are not required to register in the UK.

Which Trusts have to register?

Non-UK/EU Trusts acquiring UK real estate

- A non-UK resident trust which has a UK trustee will be required to register if it acquires real estate in the UK.
- Although not required by 5MLD, UK Government determines that a non-UK resident trust which has no UK resident trustees will also be required to register if it acquires an interest in UK real estate (however, if no UK trustee, information on the register will not be publicly available);
- Requirement to register only applies if trustees are registered at the Land Registry as the legal owners of the real estate;
- No requirement to register if the legal title is held by a nominee for the trustees. (likely nominee will need to register)
- Likely that trustees who acquire UK real estate will, at some point, be subject to UK tax and will therefore become subject to the normal rules for registration (and for third party access to the beneficial ownership information of the trust).
- Non-UK trust already holding real estate that has not been required to register as a result of any current UK tax liabilities does not have a requirement to register under new rules it appears that there will be no requirement to register as a result of the introduction of the new rules - registration requirement only if trust acquires real estate after the 5MLD rules take effect.

Which Trusts have to register?

Nominees and bare trustees

- There are no general exemptions for nominee/bare trust situations;
- Specified exemptions for commercial activities and custody arrangements for portfolio investments.
- Real Estate held by a nominee for a beneficial owner or where assets are held by parents as bare trustee for their minor children is within registration scope;
- Requirement to register only applies if the nominee/bare trustee is UK resident or the asset is UK real estate which is acquired after the 5MLD rules come into force.

Third party access to beneficial ownership information

- Third parties will have to provide detailed information about their suspicions that a trust is being used for money laundering or terrorist financing before beneficial ownership information will be released.
- Third parties will have no ability to access information about a trust if the only reason the trust is registered is because it has acquired UK real estate and the trust has no UK resident trustees.
- A third party can access beneficial ownership information in relation to a non-UK trust if the trust is registered because it has UK tax liabilities.
- Other circumstances in which information about a non-UK trust will be available to the public is where the trust has at least one UK resident trustee and has either engaged a UK service provider or has acquired UK real estate after the 5MLD regulations come into force.

What should trustees be doing?

- Current rules registration required if trusts have UK tax liabilities apply - registration is required either by 5 October or 31 January after the end of the tax year in which the tax liability arises;
- New 5MLD rules, earliest date for registration is 10 March 2022;
- New trust registration system available sometime during 2021 – no opportunity to register early;
- Trustees should be looking to identify trusts that may need to register and gather the information that will be required for the registration process.
- If the trust is already registered, do the trustees already have the required additional beneficial ownership information or does this need to be obtained from the settlor/beneficiaries/protector?
- If a trust is not already registered, will it be required to register or does it fall within the exemptions?
- If it is required to register, does the trustee have the required information?
- If overseas trustees are considering entering into a business relationship with a UK service provider, what is the best way of doing this?
- Can the trustees make a case that any of the beneficial owners would be subject to a disproportionate risk of harm if information were made available to third parties or are there any beneficial owners who are minors or incapacitated?
- If overseas trustees own real estate or have engaged service providers in more than one EU member state and/or the UK, where should they register? As long as they are registered in at least one EU member state (or the UK), there is no need to register anywhere else.

The changes introduced by 5MLD will have a significant impact on the trustees of all trusts which have connections with an EU member state or with the UK. Given the existence of exchange of information arrangements such as the common reporting standard and FACTA, trustees may wonder why there is a need for central registers of beneficial ownership information about trusts, still less, why the information on those registers should be available to third parties. However, for better or worse, the transparency bandwagon continues to gain momentum.

What information must be provided?

Trusts which have UK tax liabilities

Given the dual nature of the Register, trusts which have UK tax liabilities are required to provide more information including:

- The name and date of the trust;
- Information about the trust assets, including their value;
- The place where the trust is resident/administered; and
- Identity information in respect of each of the beneficial owners of the trust together with details of the nature and extent of their beneficial ownership.
- Beneficial owners include settlor, trustees, beneficiaries and anybody who holds certain powers in relation to the trust including power to amend the trust, to make distributions or to change the trustees and anybody who is required to consent to the exercise of any of these powers – includes Protector;
- Contingent beneficiary does not have to be named on the Register until the contingency is satisfied.
- Members of a class of beneficiaries not specifically named do not have to be identified on the Register unless they receive a benefit from the trust.

What information must be provided?

Trusts which do not have UK tax liabilities

Trusts which are not UK taxpayers only have to provide information about the beneficial owners of the trust:

Information about companies controlled by a trust

Trust which is required to register that holds a controlling interest (more than 50%) in a non-EU company;

Requirements to provide – name, place of incorporation and registered office of the company.

When does the information have to be provided?

- Trusts already registered will have to provide additional beneficial ownership information as well as information about any controlling interest in a non-EU company by 10 March 2022.
- Trusts which are not already on the Register have to be register by 10 March 2022 or within 30 days of the creation of the trust or satisfying the conditions for registration (such as entering into a UK business relationship), if later.
- If any of the registered information changes (for example there is a change of trustees), the Register must be updated within 30 days of the change;
- The updated registration service will not be available until sometime in 2021 so nothing can be done until then;
- New trusts which are required to register because they have UK tax liabilities should comply with the existing registration timescales;
- Registration by 5 October after the end of the relevant tax year if the trust is liable to income tax and/or capital gains tax or otherwise by 31 January after the end of the tax year in which a tax liability arises.

Who can access the information on the Register?

Customer due diligence

- Trusts entering into a business relationship with a relevant person provider which is within the scope of the UK's money laundering legislation - trustee required to provide relevant person with trust beneficial ownership information as contained on the Trust Register.
- Relevant person still required to collect own due diligence information in normal way.
- Discrepancies between due diligence information and the information contained on the Register – relevant person required to report to HMRC.

Third parties with a legitimate interest

- A third party will only be able to access the beneficial ownership information in respect of a trust if they have a legitimate interest in doing so.
- Onerous requirements for requesting access;
- Compelling suspicion with evidence of money laundering or terrorist financing;
- Such as - identify specific instance of suspected money laundering or terrorist financing;

Who can access the information on the Register?

Trusts with controlling interests in non-EU companies

- Trust with a controlling interest in a non-EU company, access ability of third party to access information is wider as no requirement for the third party to show a legitimate interest in obtaining the information.
- Person seeking information will have to identify non-EU company in question and relationship with the trust which holds the controlling interest;
- The person will have to demonstrate that request is in line with objectives of the directive – i.e. that it is in some way connected with the detection or prevention of money laundering or terrorist financing

Safeguarding and appeals

- Information will not be provided if there is a disproportionate risk of harm to the beneficial owner in question.
- Information will also generally not be provided where the beneficial owner is a minor or is incapacitated.
- Intended appeal process to appeal against a decision to give or withhold beneficial ownership information – No guidance on this as yet.

Penalties

There will be penalties payable where trustees fail to register or fail to update the information on the Register.

However the rules will be relatively lenient where the failure is inadvertent. There will be no penalty for the first failure. Instead, HMRC will simply write to the trustees to remind them of their obligations. There is a penalty of £100 for each subsequent failure.

There will be more significant financial penalties for deliberate failures. However, no details have yet been provided of the amount of such penalties.

Trust Funding Issues

Finance Act 2020 – Excluded Property changes

- FA2020 enacted changes to IHTA 1984 s48(3) to reverse the decision in the Barclays Wealth case (and confirm longstanding HMRC interpretation), which determined that “at the time the settlement as made” meant when the settlement was made in accordance with the usual principles of trust law, rather than each time assets were added to a settlement.
- Non-UK situated property held in trust will now only be excluded property if the settlor was neither UK resident nor domiciled at the point the property became comprised in the settlement.
- Where trust-to-trust transfers are made now, property will only remain excluded property in the second trust where the settlor remained neither UK resident nor domiciled at the point of the transfer.
- On a strict reading of the legislation, there could be consequences in unintended scenarios:
 - Loans by settlors
 - Loans by third parties
 - Trust-to-trust loans



New Jersey/Guernsey & UK DTAs

Matt Maltby

10 November 2020

The new Crown Dependencies/UK Double Tax Agreements

Broadly based on the OECD Model Treaty

With a few tweaks

Effective dates:

Jersey, 1 January 2019 / UK, 6 April 2019

Guernsey, 1 January 2020 / UK, 6 April 2019

The new Crown Dependencies/UK Double Tax Agreements

Key Changes



Residence tie-breaker

Permanent home available

Centre of vital interests



Impact

Guernsey – resident-only individuals

The new Crown Dependencies/UK Double Tax Agreements

Key Changes



Relieving provisions for:

Dividends

Interest

Royalties



Impact

Trust income tax compliance

The new Crown Dependencies/UK Double Tax Agreements

Trust income tax compliance



**Beneficial owner
resident in a Crown
Dependency?**



**A UK resident
beneficiary?**

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