

## **HMRC letters and “certificates of tax position” to individuals with overseas assets, income or gains**

### **An update for CIOT members**

This update provides information about the letters together with some guidance to help members decide the most appropriate way to respond if a client receives one of the letters from HMRC. The background to this HMRC campaign is in the appendix at the end of this update.

Since we first published this update in June 2019, HMRC has changed the wording in the letters and in the accompanying “certificate of tax position”. This update is based on the wording used by HMRC in the letters and certificates they started to send out to taxpayers in the last week of July 2020. Pdf copies of the standard wording for these letters are available alongside this update.

We understand that HMRC’s aim in sending these letters is to:

- nudge or prompt taxpayers to review their tax returns to check that they are complete and correct;
- encourage those who need to rectify mistakes to make voluntary disclosures to HMRC;
- encourage all recipients to update HMRC on whether their tax position is up to date to enable HMRC to efficiently follow up on the letters as needed.

### **What’s in the letters?**

The July 2020 version of the letters is based on information from tax information exchange agreements with other countries, including as a result of the Common Reporting Standard (CRS).

Key points to be aware of regarding the letters are:

- The most recent letters are issued by HMRC’s “Risk and Intelligence Service, Offshore”.
- The July 2020 version of the letter confirms that HMRC compared the information received under information exchange with the individual’s tax record and tax return(s) before sending the letter. It says that HMRC believes that the individual may not have paid the right amount of UK tax. This statement indicates that the letter is not speculative; HMRC is taking a risk-based approach and only contacting taxpayers where they are unable to reconcile the figures received under information exchange agreements to tax records and tax returns.
- They acknowledge that there may be a reasonable explanation for this but the individual should review their affairs and let HMRC know if they need to correct their tax position.
- They mention that some people with assets overseas have found that earlier tax advice is out of date after changes to their personal circumstances or to tax laws.
- They recommend getting professional tax advice if the person is not sure whether they have declared all their overseas income or gains which are taxable in the UK to HMRC.
- The letter invites those individuals whose health or personal circumstances make it difficult for them to deal with the matter, to tell HMRC so HMRC can help them in the most appropriate

way. There is a link to further information on GOV.UK about how HMRC helps people with additional needs.

- They are copied to the individual's tax agent if HMRC has a valid authority on their records showing that the individual is represented by an agent. A telephone number is provided on the agent copy so the agent can contact HMRC with any questions.
- Letters sent to unrepresented taxpayers recommend that they should get professional advice if they are unsure of their tax position.
- HMRC generally gives 30 days from the date of the letter to respond.
- They warn recipients that HMRC regularly carries out checks and that if HMRC later finds out that the individual did not tell HMRC everything, HMRC will view this very seriously and could carry out an investigation which could result in significant penalties or prosecution.
- At the end of the letter, there are links to relevant guidance and advice on GOV.UK.
- All the letters include a "certificate of tax position" form which HMRC asks the individual to complete and return whether they have additional tax liabilities to disclose or not. We understand that one reason why HMRC uses the "certificate of tax position" is because it helps them minimise the number of "no response" cases they would otherwise need to follow up.
- The certificate asks individuals to choose the one accurate statement from four statements, tick the relevant box and complete the further information requested.

On the certificate, the individual is asked to sign and make a declaration to the effect that:

- a) The information they provide on the certificate will be "correct and complete to the best of their knowledge and belief" [this is identical to the declaration on the self-assessment tax return Box 22 of SA100]; and
- b) They understand that dishonestly making a false statement to evade paying tax is a criminal offence that can result in investigation and prosecution [this is similar, but not identical, to the declaration on the SA100 which is "I understand that I may have to pay financial penalties and face prosecution if I give false information].

### **What you should do if a client receives one of these letters from HMRC**

#### **1. Check the position**

The letter says that HMRC is aware that the person has overseas income and / or gains and that HMRC believes that they may not have paid the right amount of UK tax. HMRC is not saying that the person's tax returns are necessarily wrong. However, as already mentioned, HMRC does carry out risk assessment before sending a letter, including comparing the information they have received to what was included on submitted tax return(s), so before responding to the letter it is essential to check with your client whether they believe that their tax returns are correct and complete to the best of their knowledge and belief.

Note also that HMRC says in the letter that there may be a reasonable explanation for any discrepancy they have identified when checking the information received from overseas tax authorities to an individual's UK tax record and tax return(s).

Discrepancies in the data received from overseas tax authorities may exist due to it often relating to a calendar year, thereby crossing over two UK tax years, and because it does not come into HMRC in a standard format. This is expected to affect mainly the early years of data exchange and should become less of an issue as we move into future tax years and HMRC's systems become more sophisticated at analysing the data they receive.

Discrepancies may also exist due to how or where income and / or gains have been reported on UK tax return(s) meaning that HMRC has not been able to match figures up to the data received from overseas tax authorities. This may occur where a total or global figure was included in boxes on the tax return(s) as HMRC does not see a breakdown of that figure. Additionally, some income may have been reported to the individual and put on the tax return as one type but reported to HMRC by the overseas tax authority under automatic exchange as a different type. This is why HMRC provides space on the certificate for the individual to let HMRC know where they reported their overseas income and / or gains on their tax return(s) (Statement 2).

Discrepancies may arise for other reasons including individuals simply not realising that they need to tell HMRC about income or gains arising overseas or erroneously believing that they do not need to include offshore income in UK returns where tax was paid overseas.

## **2. Respond to HMRC's letter, whether or not there is anything to disclose**

### **a. If a disclosure needs to be made, use the WDF or another appropriate method**

If a disclosure is required, the letter advises that this can be made via the WDF. However, HMRC cannot compel a taxpayer to use any specific method for their disclosure and using the WDF may not necessarily be the most appropriate method. Depending on the individual circumstances of the taxpayer, other approaches may be better e.g. Code of Practice 9 (Contractual Disclosure Facility (CDF)).

Agents should therefore consider their client's specific circumstances as well as the legal position. The certificate and letter refer to criminal offences and prosecution. The strict liability criminal offences in sections 106B-H TMA 1970 are now in effect too. After taking the person's circumstances and the legal position into account, agents should advise clients on the most appropriate method for a disclosure. As noted, this may not always be the WDF.

A CIOT member must comply with the fundamental principle of professional competence and due care as set out in Professional Conduct in Relation to Taxation (PCRT). This means that they should not undertake professional work which they are not competent to perform unless they obtain appropriate assistance from a suitably qualified specialist. Advice from another adviser specialising in tax disputes may therefore be needed if the agent does not

have the necessary expertise to advise on a suitable disclosure route and handle a disclosure under either the WDF or the CDF themselves.

It is also important to note that there is no *de minimis* level below which mistakes do not need to be disclosed.

**b. If no disclosure is needed, consider sending HMRC an explanation by letter.**

HMRC will accept a response by letter instead of a person completing the “certificate of tax position” (see 3. below).

Where no response to their letter is received, HMRC will follow up so not responding at all will attract more attention from HMRC. Follow up is likely to be by a further letter in the first instance. If no response is forthcoming after the second letter, HMRC will consider the most appropriate action to take next following further risk assessment. This could range from contacting the person by telephone to opening an enquiry or investigation.

Responding to the initial letter will therefore mitigate the risks of further action being taken by HMRC. However, HMRC can make no guarantee that responding to the letter will avoid an enquiry. They will follow up on some individuals on a random basis as well as checking cases where they consider mistakes were made on tax returns where disclosures are not started.

If possible, try to respond within the 30 days provided by HMRC. However, if it is not possible or practical to respond fully to the letter within this timescale consider contacting HMRC either by telephone or letter to agree a more realistic timescale with them.

**3. In view of the serious consequences of making a false declaration, consider very carefully whether your client should sign and return the “certificate of tax position”.**

When advising a client who has received one of these letters, it will clearly be important that the consequences of completing and signing the certificate are made clear to them.

Although the declarations in the “certificate of tax position” are similar, if not completely identical, to those on the self-assessment tax return, there are two important differences.

Unlike the tax return:

- There is no legal obligation on the individual to complete the “certificate of tax position” and return it to HMRC; and
- The period covered by the “certificate of tax position” - and therefore the declarations - is not restricted to a particular tax year. It applies to all tax years.

The certificate does not have a *de minimis* level.

In the most recent version of the certificate the individual is asked to choose which of four statements is accurate for their circumstances. However, it is possible that more than one of

the statements may be accurate depending upon the individual person's circumstances, for example this might be the case if more than one tax year is involved.

There is little space on the certificate to include much information or explanation. A response by letter is preferable as that enables an explanation to be included which could pre-empt further queries by HMRC. For example, in the case of a non-UK domiciled individual, to confirm that no funds were remitted to the UK and that all the funds deposited into the account came from funds on which UK tax was paid as appropriate in past years (i.e. that there may have been overseas income or gains which have legitimately not been disclosed).

In discussions between the CIOT and HMRC, HMRC agreed that:

- there is no legal obligation for the individual to complete and return the certificate to them,
- it is likely to be preferable to respond by letter particularly where clients have complex tax affairs or need to tick more than one of the certificate's boxes, as this will enable more information / explanations to be provided to HMRC about their tax position.
- they will accept a response by letter as an alternative should an individual choose not to complete the declaration.

In view of the serious consequences of making a false declaration (including by ticking the wrong box), it is likely to be preferable to respond by letter to HMRC and not complete the certificate of tax position, unless the individual's tax affairs are very straightforward. It is also likely to be preferable to respond by letter and not complete the certificate of tax position, if, after reviewing their tax affairs, the individual believes that their affairs are correct and up to date and they do not need to make a disclosure (given the serious consequences of making a false declaration).

As noted already, HMRC's letter does require a response in one form or another. If the individual needs to make a disclosure but decides not to complete the "certificate of tax position", it would be good practice to respond to HMRC's letter in writing and advise HMRC that a disclosure via the WDF or other method is being made.

### **Chartered Institute of Taxation**

Originally published 14 June 2019; updated 10 March 2020 and 30 July 2020 (for changes in the wording of HMRC's letter and certificate of tax position)

## Appendix

### Background

Since 2017, HMRC has sent letters to UK individuals who they have identified as having received income or gains from overseas accounts or investments that they may have to pay UK tax on. These are prompted by information HMRC receives from overseas tax authorities under Automatic Exchange of Information (AEOI) agreements about UK residents with financial accounts and investments overseas. As noted, the letters are targeted at individuals whom the data identifies as having received income or gains from overseas accounts or investments. HMRC also undertakes some additional risk assessment before sending the letters.

The UK has AEOI agreements under four regimes:

1. United States Foreign Account Tax Compliance Act (FATCA) – this requires financial institutions outside the USA to pass information about the accounts of US persons to the US Internal Revenue Service (IRS). As part of the Intergovernmental Agreement (IGA) between the UK and USA, the US has agreed to provide the UK with reciprocal data on the US accounts of UK persons. The regulations implementing the IGA came into force on 30 June 2014.
2. Crown Dependencies and Overseas Territories - the UK has reciprocal agreements with Gibraltar, Guernsey, the Isle of Man and Jersey. Under these agreements, each government commits to an annual automatic exchange of information relating to financial accounts maintained by financial institutions in their territory which belong to the other party's tax residents and have effect for accounts maintained on or after 30 June 2014.
3. The Organisation for Economic Co-operation and Development (OECD's) Common Reporting Standard (CRS) - the standard for all automatic exchange of financial information. Over 100 countries have committed to adopt the CRS. Exchange of information began in 2017 and 70 signatory countries exchanged data from 30 September 2018.
4. Directive on Administrative Co-operation in the field of taxation – Council Directive 2011/16/EU provides for the exchange of information between tax authorities of EU member states (i.e. it applies the CRS throughout the EU).

Some of the letters sent by HMRC in the past few years that the CIOT is aware of are:

March 2017	based on information from the US IRS under the IGA to improve international tax compliance and implement FATCA
February 2018	based on information from AEOI with the Crown Dependencies and Overseas Territories
February 2019	based on information from tax information exchange agreements with other countries, including as a result of the CRS.
February 2020	based on information from tax information exchange agreements with other countries, including as a result of the CRS (with some changes in the wording of the letter and certificate of tax position compared to the February 2019 version).
July 2020	based on information from tax information exchange agreements with other countries, including as a result of the CRS (with some changes in the wording of the

letter and certificate of tax position compared to the February 2020 version). This update is based on the wording used in these letters.

With data from overseas now being constantly received under AEOI agreements, HMRC is adopting an approach of sending out batches of letters at regular intervals. Members should be aware that this approach will continue for the foreseeable future.