HMRC Consultation Document
Tackling offshore tax evasion: A new criminal offence for offshore evaders
Response by the Chartered Institute of Taxation

1 Introduction

1.1 This consultation document is inviting comments on the detail of a new strict liability offence for failing to declare taxable offshore income and gains, following an initial HM Revenue and Customs (HMRC) consultation in 2014. It is also publishing draft legislation for comment.

2 Executive summary

2.1 The Chartered Institute of Taxation (CIOT) strongly supports HMRC’s efforts to tackle tax evasion. However, as we stated in our response to the initial HMRC consultation on this proposal last year¹, we are opposed as a matter of principle to the creation of a new strict liability offence for offshore tax evasion.

2.2 We are therefore disappointed that the Government and HMRC have decided to proceed with the introduction of this offence, despite paragraph 2 of Annex B stating that ‘a significant majority of respondents were unconvinced by the case for a strict liability offence’.

2.3 We note that paragraph 3.4 of the consultation document refers to the fact that in light of the concerns raised, the questions in this follow-up consultation ‘focus on ensuring the offence is targeted at only the most serious offshore tax evaders’. This must surely be the correct approach, as it cannot be right that an individual who has

¹ HMRC Consultation- Tackling Offshore Tax Evasion: A new criminal offence Response by the CIOT (31 October 2014)
simply made a mistake in their financial affairs without intending to act wrongly should be charged, and possibly convicted, of a criminal offence. However, the risk is that once this legislation is in place, it could be used much more widely by a future administration and not confined to cases where there is clear criminal intention.

2.4 We made several critical observations in our response last year about the introduction of the offence. We do not intend to repeat them all in detail here. However, these remain our views. In summary we:

1. questioned whether a new strict liability offence is really necessary, given that HMRC already have wide criminal investigatory powers;
2. expressed concerns that the nature of the offence will mean that taxpayers may fall within its ambit without any knowledge or intention on their part;
3. recommended that the introduction of the offence is delayed until at least 2017 in order that taxpayers have adequate time to put their affairs in order;
4. remarked that cases involving offshore tax evasion may well involve complex technical issues and legal arguments which may not be appropriate to be heard in a Magistrate’s Court;
5. noted in some detail that it is unlikely that the offence will be compliant with EU law. The imposition of a criminal offence applying only to offshore income and gains restricts the free movement of capital (Article 63 of the Treaty of the Functioning of the European Union (TFEU)) and, possibly, also the freedom of establishment (TFEU article 49);
6. said that if the Government and HMRC are intent on introducing the offence then the safeguards will need to be extremely robust.

2.5 The consultation document states at paragraph 2.12 that having a strict liability criminal offence is not a new concept to the UK tax system and gives the example of Income Tax (Earnings and Pensions) Act 2003 section 684(4A) as being a strict liability offence in relation to a failure to comply with certain PAYE regulations. Section 684(4A) provides that the PAYE liability due from the employer can be moved to the employee if HMRC so decides. We therefore struggle to see that there is any link with strict liability.

2.6 Our response to this consultation document should therefore be viewed in light of our strong opposition to the creation of a new strict liability offence as a matter of principle. If the overall proposal proceeds, second-order choices need to be made about its design, and some specific provisions can mitigate to a degree the damage likely to be caused. Where in the following paragraphs we state agreement with some particular aspect of the proposal that should be seen in this context and not interpreted as support for the overall proposal.

3 Q1. Do you agree that there should be a statutory defence of reasonable excuse for those parts of the offence arising from a failure to notify chargeability to tax and failure to file a return; and of reasonable care for that part of the offence arising from an inaccurate return?

3.1 Yes. As mentioned in our response to the first consultation last year, it is our view that it is absolutely essential that statutory defences are permitted to limit the scope of the offence.

3.2 We are concerned that the burden of proof is being placed on the taxpayer to show that they have taken reasonable care in making their return (see paragraph 8.1
This is the wrong way round. It should be for HMRC to demonstrate carelessness, as it is with penalties.

3.3 We note that the Government believes that the defences of reasonable excuse and reasonable care provide sufficient safeguards in themselves so that there is no need for any further defences, such as having sought and followed appropriate advice. We agree that anyone who has taken appropriate professional advice and followed it should not be guilty of an offence. This should incorporate reliance both on professional advisers and on entities responsible for providing relevant factual information (such as banks or trust companies). We would prefer, however, for this position to be made as explicit as possible, if not in the legislation itself then in accompanying guidance.

3.4 The following are examples of real-life cases handled by our members, involving undeclared offshore income where the taxpayer did not know they had broken any rules, but which we understand would be deemed to be criminal under this proposed offence. We would suggest that any statutory defence ought to be capable of preventing each of these situations from falling within the offence.

- An elderly lady who did not realise the funds were taxable in the UK as they had already been taxed in the local jurisdiction;
- A non-domiciled individual who unwittingly mixed up income and capital remittances;
- A beneficiary of a trust occupying trust property in circumstances where (unknown to them) the trust had realised income which was attributable to the beneficiary under the transfer of assets abroad legislation.

3.5 Further situations in which we can envisage a taxpayer could find themselves guilty under the proposed new offence include:

- inheriting an offshore bank account as part of the residue of an estate without any direct knowledge of it;
- being the beneficiary of an offshore bank account held on trust with no knowledge;
- genuinely believing oneself to be non-resident (and the income therefore non-taxable) but it later being proved otherwise. The mistake might be any one of a number of mistakes given the complexity of the Statutory Residence Test;
- where there is technical doubt about whether income is taxable or not.

3.6 We do not believe it is appropriate to make taxpayers in such circumstances criminally liable. We also believe that this will be counterproductive for HMRC as it will make such disputes much more difficult to resolve. Even if taxpayers had not taken proper advice and thus could be considered careless, we do not think that a criminal conviction is an appropriate sanction.

3.7 There is a risk that the offence will scare the compliant majority, so the legislation does need to be clear that it is intended to tackle dishonest/fraudulent behaviour. Education and publicity would need to make this clear.

3.8 It would be helpful if HMRC provide examples of situations where they believe the statutory defences of reasonable excuse and reasonable care will apply.
4 Q2. Are there any other legislative safeguards that should be included in the offence?

4.1 We welcome a statutory minimum threshold amount of tax evaded, see draft section 106F(2), although we do not think that £5,000 is high enough. We think that £25,000 would be more appropriate. We agree that it should be based on the ‘potential lost revenue’ model from the existing civil penalties for inaccuracies in returns and that it should apply to each tax year separately.

4.2 We are pleased to note that paragraph 4.19 of the consultation document states that the Government wishes to make it clear that the offence will not have retrospective effect. However, see paragraph 8.4 below for comments on the commencement provisions in draft section 106H.

4.3 We are disappointed that the offence will not contain an exclusion from prosecution for a full, unprompted, disclosure. We said in our response to the initial consultation that without such an exclusion the threat of a strict liability prosecution risks discouraging voluntary disclosure.

4.4 Uncertainty as to whether or not a criminal prosecution will be brought and the absence of the need to show mens rea will make it extremely hard for practitioners to advise clients appropriately. It would be extremely helpful for practitioners advising clients if HMRC could provide guidelines on the sorts of occasions when they would use the strict liability offence as opposed to other criminal offences or would decide to proceed on a civil basis.

4.5 We suggest that some thought be given to whether the legislation should have a ‘sunset clause’ so that HMRC would have to revert to Parliament to extend it. In any case, we think that there should be a comprehensive post-implementation review of the measures.

5 Q3. When HMRC cannot accurately apportion an item of income or a gain between the UK and overseas, or between different overseas jurisdictions, how should that sum be taken into account when deciding whether tax understated exceeds the threshold amount? Do you agree that the use of a certification regime, as outlined above, would be an appropriate way forward?

5.1 This seems sensible.

6 Q4. Do you agree that overseas income and gains that are deemed to be that of the taxpayer under various anti-avoidance provisions should be taken into account in the normal way?

6.1 No, we would have thought that deemed offshore income and gains under anti-avoidance provisions should be treated differently. Firstly, there is the very real possibility (as we allude to earlier) that a person may simply not know that trust income or gains; or gains of certain offshore companies are theirs at all. Secondly, there is the difficulty of getting information from some offshore providers. There are some highly technical anti-avoidance provisions in Income Tax Act 2007 and Taxation of Chargeable Gains Act (TCGA) 1979. All of that is a recipe for individuals making
7 Q5. Do you have any views, comments or evidence which may help inform our understanding of likely impacts?

7.1 The assessment of impacts on page 21 contains little information, in particular of the likely number of prosecutions expected to be made under the new offence.

8 Comments on the draft legislation in Chapter 5.

8.1 Under the provisions of Finance Act 2007 Schedule 24 (Penalties for Errors), it is for HMRC to show that a document contains a careless or deliberate inaccuracy. However, draft section 106D(2) places the burden of proof on the taxpayer to prove that they took reasonable care to ensure that the return was accurate. It would be a stronger safeguard for the taxpayer if the burden on proof was on HMRC to prove that reasonable care had not been taken.

8.2 We wonder what is intended by draft section 106F(1), which states: ‘Where a period of time is extended under subsection (2) of section 118 by HMRC, the tribunal or an officer (but not where a period is otherwise extended under that subsection), any reference in section 106B, 106C or 106D to the end of the period is to be read as a reference to the end of the period as so extended.’

Two questions arise. The first question is what periods of time might draft section 106F(1) apply to. On the face of it there is nothing ‘required to be done within a limited time’ in any of draft section 106B, section 106C or section 106D. Presumably, therefore, the reference in the opening words of draft section 106F is to the time limits for TMA 1970 section 7 (in the case of draft section 106B) and section 8 (in the case of draft section 106C). However, there is nothing to which draft section 106D refers which is ‘required to be done within a limited time’. Therefore we think an explanation of the intended effect of draft section 106F(1) would be very helpful.

The second question arises even if the period of time extended by TMA 1970 section 118(2) is intended to be the ‘notification period’ (in the case of draft section 106B), the ‘withdrawal period’ (in the case of draft section 106C) or the amendment period (in the case of draft section 106D). It is what is meant by the words ‘(but not where a period is otherwise extended under that subsection)’? We think they have the effect of applying only the first part of TMA 1970 section 118(2), and of preventing the second (reasonable excuse) part from applying, though this is not clear. We do not see any good reason for this, though presumably the ‘reasonable excuse’ defences in sections 106B, 106C and 106D will normally mean application of any part of section 118(2) is rare.

8.3 We understood that there would be an option for a prison sentence of up to 6 months (paragraph 4.4 of the consultation document) and that the offence is not retrospective. We do not understand the reference therefore in draft section 106G to the possibility of a significantly longer period of imprisonment - a term not exceeding 51 weeks – and to an offence which is committed before the coming into force of Criminal Justice Act 2003 section 281(5).

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2 HMRC Compliance Handbook CH81180
8.4 Draft section 106H deals with the commencement provisions. These might allow some returns to be affected for past years, depending on the appointed day(s). As the consultation makes it very clear that the offence will not have retrospective effect, the commencement provisions ought to reflect this.

8.5 We note that regulations are referred to throughout the draft legislation. We assume that the regulations will be published in draft for comment in due course. Given the very broad implications of the proposed measures and the need to ensure the legislation and any accompanying guidance is carefully targeted, we would welcome the opportunity to continue to discuss these proposals with HMRC as the consultation process develops. In particular, if a further meeting after responses have been collated would assist, we would be more than happy to take part.

9 The Chartered Institute of Taxation

9.1 The Chartered Institute of Taxation (CIOT) is the leading professional body in the United Kingdom concerned solely with taxation. The CIOT is an educational charity, promoting education and study of the administration and practice of taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. The CIOT’s work covers all aspects of taxation, including direct and indirect taxes and duties. Through our Low Incomes Tax Reform Group (LITRG), the CIOT has a particular focus on improving the tax system, including tax credits and benefits, for the unrepresented taxpayer.

The CIOT draws on our members’ experience in private practice, commerce and industry, government and academia to improve tax administration and propose and explain how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries. The CIOT’s comments and recommendations on tax issues are made in line with our charitable objectives: we are politically neutral in our work.

The CIOT’s 17,000 members have the practising title of ‘Chartered Tax Adviser’ and the designatory letters ‘CTA’, to represent the leading tax qualification.

The Chartered Institute of Taxation
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