BY
Fergal Cahill and Kevin Lambe

Deadline for Making Disclosures of Foreign Income and Assets

Fergal Cahill and Kevin Lambe explain the importance of disclosing offshore activities before 1st May 2017

Fergal Cahill is the Managing Director of CTS and is a graduate of Law & Accounting from the University of Limerick. He qualified as a Chartered Tax Adviser with the Irish Tax Institute.

Prior to founding CTS in 2007, his career included spells as Trainee in PWC Limerick, Tax Senior in PWC Cork, Tax Director in FGS and Tax Director in KPMG. His particular areas of expertise include Revenue audits, corporate restructuring, succession planning, personal tax planning and VAT on property.

Kevin Lambe is Tax Manager in CTS and is a B.Sc. graduate in Accounting and Finance from Dublin Institute of Technology and a Chartered Tax Adviser (AITI). His particular areas of expertise include VAT on property, Revenue Disclosures and Audits and Tax Compliance.

Introduction

Between now and the end of April, many practitioners will meet clients with money in offshore accounts. In many cases, the individuals will have sought refuge from high tax rates during the 80s and 90s in exotic locations around the world. There will certainly be many meetings with stressed clients during which we will be asked how we can fix the problem for them. Individuals owning companies and other assets abroad will also be looking for guidance on what to do: "Should I disclose?", "How much will it cost me?", "What happens if I do nothing?"

In this article, we will examine the detail behind the forthcoming deadline for disclosure of offshore activities and demonstrate clearly that there is only one option available – a disclosure needs to be made before 1 May 2017.

Background

The background to the current intervention was the provisions included in Finance Act 2016 in relation to foreign income, gains and assets. As a result of the new measures, with effect from 1 May 2017, individuals who hold offshore accounts, properties, companies or trusts, or who are in receipt of offshore income, will no longer be in a position to avail of the benefits of a qualifying disclosure. The measures are designed to counteract offshore tax evasion by incentivising individuals to make a voluntary disclosure in relation to offshore matters before 1 May 2017.

Revenue's actions need to be seen in the context of the international discourse surrounding offshore tax evasion. There is a groundswell of opinion worldwide that tax authorities need to do more to counteract offshore tax evasion and avoidance, both at a corporate and individual level. The issue of offshore tax evasion came to particular prominence recently with the publication of the "Panama Papers" in April 2016.

The proposed changes are also part of the recent developments in the area of mandatory automatic financial information exchange between countries, known as the Common Reporting Standard ("CRS"). Over 100 jurisdictions have committed to exchange information held by financial institutions regarding their non-resident customers under the CRS, with the first data exchanges due to take place in September 2017.

Disclosures affected by proposed changes

The new provisions will apply where a disclosure relates directly or indirectly to any of the following:

- an account held or situated in a country or territory outside Ireland;
- income or gains arising from a source, or accruing, in a country or territory outside Ireland;
- property situated in a country or territory outside Ireland.

The definition of "offshore" applies to all countries except the Republic of Ireland (Northern Ireland is regarded as "offshore"). Offshore assets and income will therefore not be limited to tax havens traditionally associated with the word "offshore", such as the Isle of Man or the Cayman Islands.

Essentially, an offshore disclosure made after 30 April 2017 will not be treated as a qualifying disclosure and the mitigated penalties and settlement terms set out in Revenue's Code of Practice for Revenue Audit and other Compliance Interventions will not be available to the taxpayer.

Offshore Disclosure made before 1 May 2017

Should one make a disclosure in relation to offshore matters before 1 May 2017? We believe that there is only one answer to this question and that is a very definite "yes".

There are a number of benefits in making a disclosure before 1 May 2017, as follows:

- Penalties are capped at 10%, with the exception of pre-1991 liabilities which will attract a 100% penalty (due to the amnesty granted at that time).
- No publication in the quarterly Tax Defaulters' List.
- No criminal prosecution.
- Most importantly, it appears that statutory interest has been capped (currently at circa 87%) for all years, including pre-1991 liabilities (based on Revenue's online "Liabilities Estimator").

In our view, one should not underestimate the benefits of the interest cap. In normal circumstances, a disclosure made in respect of, say, a 1991 liability would currently attract statutory interest of over 280% while a disclosure made in respect of 2001 would be liable to statutory interest of circa 143%. Statutory interest is therefore highly penal and in many cases can greatly exceed the actual tax liabilities arising from the disclosure, particularly in the case of historic liabilities. So, the 87% "cap" is a significant benefit.

While it is not expressly stated on Revenue's website, it may be that the interest cap is not available in relation to disclosures post 1 May 2017.

Offshore Disclosure made after 1 May 2017

With effect from 1 May 2017, the consequences of disclosing liabilities involving offshore matters will be as follows:

- 100% penalty rate will be applied.
- Settlement will be published in the quarterly Tax Defaulters' List.
- Taxpayer may be the subject of a criminal prosecution.
- It is expected that full statutory interest rates will be applied.
- Where tax liabilities arise within Ireland as well as liabilities relating to offshore matters, a qualifying disclosure will be unavailable in respect of all the "onshore" liabilities, except in limited circumstances (where the offshore element of the default was careless in nature and the underpayment did not exceed 15% of the total tax due).
- The introduction of a new strict liability criminal offence for failure to return details of offshore matters was also announced in Budget 2017, similar to the measures introduced in the UK. However, this strict liability criminal offence was not included in Finance Act 2016 but one would expect it is to be introduced in due course. In any event, Revenue have the power to refer certain tax offences to the DPP for criminal prosecution with Judges having the power to impose custodial sentences of up to 5 years and fines of up to €127,000 where a taxpayer is convicted on indictment for serious tax evasion.

Making a Disclosure

A "Liabilities Estimator" spreadsheet has been provided on the Revenue website whereby the taxpayer can self-assess the liabilities arising on the offshore disclosure. The spreadsheet assumes that the individual in question is a top rate taxpayer, so in the case of lower tax taxpayers, the individual will be required to prepare their own tax computations as normal.

It is recommended that the offshore disclosure is made via Revenue's "MyEnquiries" portal. It is not necessary to submit advance notice to Revenue regarding the intention to make a disclosure. It is not sufficient to file a notice of intention before 1 May 2017 as Revenue envisage a full disclosure before the deadline.

Revenue's FAQs in relation to offshore disclosures confirms that tax returns (amended or otherwise) need not be submitted as part of the disclosure. The submission of the tax computations to Revenue will be sufficient.

In terms of payment of the offshore liabilities, if the taxpayer cannot discharge the liabilities arising from the disclosure in full, Revenue will consider a phased payment arrangement.

Anti-Avoidance Legislation

The use of offshore trusts and offshore companies for asset acquisition was prevalent in the past, so it will be important that disclosures address the possible application of attribution provisions such as Section 579A (offshore trust gains) , Section 590 (offshore company gains) and Section 806 (offshore income).

Summary

While every case will differ, the benefits and certainty of making a qualifying disclosure should not be underestimated. The 1 May 2017 deadline should be seen as an opportunity for taxpayers to review their offshore assets and structures and address any issues as required.

The benefits arising from making an offshore disclosure prior to 1 May 2017 are considerable and it is in the taxpayers' interest to make a disclosure in advance of the deadline. It is almost certain that Revenue will take a hardline approach in relation to any offshore matters after 1 May 2017 and the presumption should be that Revenue have the information. The opportunity of making a qualifying disclosure should therefore not be missed.