

## ● DEALING WITH HMRC INVESTIGATIONS INTO OFFSHORE ACCOUNTS

In May 2006 H.M. Revenue & Customs ("HMRC") won a landmark victory with significant ramifications. The Special Commissioners ruled in favour of HMRC against Barclays Bank plc, which forced the bank to release to HMRC certain personal details of its clients who hold offshore accounts so HMRC could investigate any irregularities relating to unpaid tax on interest earned. It was assumed that this was merely the 'tip of the iceberg' and that HMRC were after a far bigger prize beyond unpaid interest earned in offshore accounts.

Then, as from 2009, the Finance Act 2008 authorised HMRC to issue information notices requiring UK financial institutions to provide HMRC with certain information and documentation, within their power or possession, relating to account holders who have an address within the United Kingdom and who hold a non-United Kingdom bank account. A non-United Kingdom bank account is an account where the money or assets relevant to the account are held outside of England, Wales, Scotland and Northern Ireland.

On 13 August 2009 HMRC obtained approval from the First-tier Tribunal to issue information notices to over 300 UK financial institutions requiring them to produce reasonably required information about account holders with offshore accounts to check the UK tax position of a class of persons not known to HMRC.

### UK FINANCIAL INSTITUTIONS

A UK financial institution has very limited rights upon receiving an information notice from HMRC. The Finance Act 2009 contains specific provisions preventing appeals against the First-tier Tribunal's decision to approve the issuance of an information notice. However, it may be possible to appeal on the basis that it would be unduly onerous

to comply with the information notice. If a UK financial institution will have significant difficulties in complying with the terms of the information notice within the specified and required time period, then it should consider approaching HMRC as soon as possible for an extension and/or making an appeal within 30 days of receipt of the information notice.

The Finance Act 2009 contains certain exemptions for legally privileged materials and auditors' and tax advisers' papers. However, these are unlikely to be relevant to the factual information requested by HMRC. That said, it is doubtful that HMRC can demand the production of documents not in the UK financial institution's possession or power.

### UK FINANCIAL INSTITUTIONS: INFORMATION HELD OFFSHORE

If a UK financial institution receives a notice from HMRC in respect of an account held by its subsidiary offshore, such as in the Channel Islands, then the information may not be within the parent's possession or power. This will depend upon the position under local law and its response to HMRC depends on the particular factual position applying to that financial institution. However, the UK financial institution should always keep in mind its duty of confidentiality owed to its customers and any data protection issues under local laws. The financial institution should consider the following points as a minimum:

- The legal structure of its Channel Island business;
- The local rules as to confidentiality, how these apply in each case and how they are affected by any contractual arrangements made between the Channel Island entity and its customers;
- The extent to which the onshore financial institution has documents or information relating to customers of the subsidiary or

branch available to it without the need to access the written records or computer network (and servers) which support the offshore business;

- What arrangements need to be made to secure compliance with the Data Protection (Bailiwick of Guernsey) Law, 2001 and the Data Protection (Jersey) Law, 2005 when dealing with Channel Island customer information;
- Whether, if an onshore institution already has de facto access to subsidiary or branch customer information, such information was delivered in breach of any duty of confidentiality and, if so, what might be done about that; and
- How any information which is available should best be collated.

### TAX INFORMATION EXCHANGE ARRANGEMENTS ("TIEAS")

A UK financial institution must also consider the existence of any TIEA in the jurisdiction it has an offshore subsidiary. The TIEA was developed by the OECD Global Forum Working Group on Effective Exchange of Information to promote international co-operation in tax matters to establish effective exchange of information.

Presently the Channel Islands have 52 TIEAs in place (Jersey has 24 and Guernsey has 28, with more TIEAs being negotiated) with countries which include with the United Kingdom, China and the United States of America. The TIEA with the United Kingdom agrees that the authorities of Jersey and Guernsey will ensure that they have authority to obtain and provide, upon request, information:

- (1) held by banks, other financial institutions, and any person, including nominees and trustees, acting in an agency or fiduciary capacity; and

(2) regarding the ownership of companies, partnerships, collective investment schemes, trusts, foundations and other persons, including information on all persons in an ownership chain;

provided that, the requesting authority may only make a request for such information when it is unable to obtain it by other means. Such information will be exchanged without regard to whether the requesting authority needs the information for its own tax purposes or that the conduct being investigated would constitute a crime under the laws of the requesting authority's territory.

The Channel Islands have, for many years, taken a proactive and responsible approach to international co-operation in tax matters and are dedicated to being transparent, highly regulated and providing quality financial services. Therefore if HMRC cannot obtain the required information by serving an information notice upon a subsidiary of a UK financial institution based in the Channel Islands, then it is entirely possible HMRC may, with the assistance of the British Government, request the authorities of Jersey and Guernsey to provide such information pursuant to the TIEA.

#### **UK TAXPAYERS WITH OFFSHORE ACCOUNTS**

##### **Liechtenstein**

The UK signed a TIEA with Liechtenstein on 11 August 2009 enabling the UK and Liechtenstein to exchange information to ensure that the correct amount of tax is paid in each country.

However, on 1 September 2009 HMRC introduced the Liechtenstein Disclosure Facility ('LDF') giving UK taxpayers, including individuals, companies, partnerships and trusts, the opportunity to voluntarily disclose information in exchange for a reduced penalty of 10%. A key benefit of the LDF is that HMRC has agreed to only recover unpaid tax from 6 April 1999 onwards whereas, usually, HMRC has the power to collect unpaid taxes for a 20 year period. The LDF will expire on 31 March 2015 and any UK

taxpayer failing to make full disclosure by then may find their accounts in Liechtenstein closed down.

However, to demonstrate how serious HMRC is about protecting the UK Exchequer from taxpayers seeking to evade taxes, it was reported that HMRC paid an informant £100,000 for data regarding UK taxpayers who have bank accounts in Liechtenstein. No doubt HMRC will also use the TIEA with Liechtenstein to obtain such information and therefore HMRC may well have identified many UK taxpayers with accounts in Liechtenstein who have not taken advantage of the LDF before its expiry in 2015. Those taxpayers may face investigations from April 2015 onwards.

##### **Switzerland**

On 25 October 2010 the UK and Switzerland agreed inter alia that: (1) existing untaxed assets should be regularised; (2) future investment income (interest, dividend, capital gains or other investment income) should be covered by a withholding tax; and (3) tax will be transferred to the UK on a no-name basis. Furthermore, Switzerland agreed to provide extended administrative assistance to ensure that UK taxpayers are not circumventing the withholding tax.

In August 2011, the UK/Switzerland Double Taxation Convention was revealed and in October 2011 HMRC announced it would commence writing to UK residents and organisations holding Swiss bank accounts with HSBC in Geneva who HMRC believes have not reported all their income and gains. HMRC received the information of UK taxpayers having HSBC Swiss accounts from the French tax authorities pursuant to a TIEA. The letters issued by HMRC warn that those account holders who do not come forward will be the subject of an investigation where penalties of up to 200% could be levied. HMRC has warned that account holders will only be given a maximum of 30 days to disclose and that this timeframe is not negotiable, not leaving much time for account holders to take advice or restructure their affairs.

This is clearly an aggressive approach from HMRC making it apparent, certainly to HSBC Geneva account holders, that HMRC is very serious and proactive about protecting the UK Exchequer.

##### **HMRC OFFSHORE CO-ORDINATION UNIT**

Recently HMRC has established the new "Offshore Co-ordination Unit" staffed by twenty five inspectors and numerous HMRC support staff. The UK government made £917 million available to HMRC to assist in closing the tax gap and targeting offshore accounts in particular. The new Offshore Co-ordination Unit, and HMRC's attitude to Swiss account holders, is a clear example of HMRC's determination to recover evaded taxes.

##### **PENALTIES FOR NON-COMPLIANCE**

It is worth noting that HMRC can impose a fixed penalty fine of £300 for failing to provide the information or documents required by an information notice. Thereafter, HMRC can also impose a further penalty of £60 which arises for each and every day the breach is ongoing.

For example, Mr Tom Wan was fined a total of £1340 pursuant to daily fines of £10 imposed by HMRC for alleged failure to comply with the requirements of an information notice dated 9 September 2009. Mr Wan appealed the daily penalties to the First-tier Tribunal on 5 July 2011 arguing that he had supplied all the necessary information, but the First-tier Tribunal rejected this contention dismissing Mr Wan's appeal finding that he had failed to provide statements for three bank accounts.

HMRC also has available the option of bringing criminal proceedings if documents are being concealed or destroyed following notice that the documents are likely to be the subject to an information notice.

Furthermore, as from 1 April 2010, HMRC is able to 'name and shame' serious tax evaders on HMRC's website as an additional deterrent to reduce tax evasion.

**CONCLUSION**

It is a reasonable assumption that the economic turmoil and deficit difficulties facing the UK will invigorate HMRC to investigate offshore accounts.

UK taxpayers are perfectly entitled to operate bank and investment accounts in offshore jurisdictions. However, those UK taxpayers not fully complying with their obligations to the UK Exchequer may find HMRC knocking on their door. It would be sensible for those taxpayers to take the initiative and seek professional advice before HMRC writes to them. The Channel Islands can assist those taxpayers with the proper structuring of their wealth and/or business interests for their present and future benefit without fearing "the knock" from HMRC.

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