The carrot or the stick?

Amit Puri examines HMRC's Worldwide Disclosure Facility statistics and asks the question – where are we now?

Most tax practitioners will be aware the deadline for registering with HMRC to make a voluntary tax disclosure under the Requirement to Correct (RTC) provisions has long since passed. The RTC rules required any person with historic offshore tax irregularities as at 5 April 2017 and/or earlier to 'correct' them by 30 September 2018.

Unlike previous offshore disclosure facilities there was no carrot here, but a large stick was waiting for those only subsequently disclosing (voluntarily) and those identified by HMRC (prompted) as having historic tax exposure. Unfortunately, the stricter Failure to Correct (FTC) penalties came into force for all such clients who had not notified HMRC during the RTC window: (where the taxes payable were: income tax, capital gains tax or inheritance tax).

Year	Number of WDF 'notifications of intent' to disclose	Number of WDF 'disclosures received'
2016	211	88
2017	4,368	2,833
2018	15,244	8,334
2019	4,468	8,255
2020*	1,459*	1,108*
Total	24,291	19,510

*2020 values are up to 13/05/2020 only

HMRC's guidance on the RTC and FTC is here, and in their Compliance Handbook here.

HMRC created a new line in the sand, which is now used to trigger newer FTC penalties. These were supposed to be simpler to administer in comparison to the regular behaviour-based penalty regime, but are wider ranging and complex to understand fully.

Freedom of Information request

Following a recent Freedom of Information Act request, I have obtained up-to-date statistics on HMRC's Worldwide Disclosure Facility (WDF)'s uptake.

This article does not look at the Common Reporting Standard, but it is worth noting that this global framework underpins the newer international financial accounts information exchange agreements, enabling over 100 jurisdictions to share rich data with one another annually – automatically – without needing a specific request by HMRC/the UK. In March 2019, HMRC reported that they had received over 5.6 million records on UK taxpayers' non-UK accounts in 2018 alone! This significantly enhances HMRC's ability to detect offshore tax non-compliance and new non-UK footprints.

The WDF is a facility through which clients can make voluntary tax disclosures. This campaign style initiative was launched on 5 September 2016 to help would-be disclosers take action during the limited RTC window, and it remains open today with no known closure date. Practitioners will recognise that it's streamlined

Year	Tax	Interest	Penalties	Total
2016	£995,598	£142,590	£106,642	£1,244,831
2017	£25,469,102	£4,510,624	£3,238,601	£33,218,328
2018	£81,267,286	£9,885,174	£9,279,856	£100,432,317
2019	£129,578,030	£20,569,685	£20,774,308	£170,922,024
2020*	£8,655,598	£965,446	£3,380,107	£13,001,152
	£245,965,614	£36,073,519	£36,779,514	£318,818,652

***2020 values are up to 13/05/2020 only**

compared to say a COP9 investigation which is reserved for cases of suspected tax fraud and a COP8 investigation which HMRC use to investigate suspected large losses of tax, and even routine looking enquiries/interventions.

WDF Statistics

Many of us will have noticed that HMRC have not published any WDF statistics to date, for example: the number of registrations, submissions, total revenues collected, etc. This normally happens when there is nothing to shout about... Our recent request for WDF statistics was fruitful (see table above and on previous page).

What do these figures tell us? Not much in my view, other than there being almost 25,000 registrations and almost 20,000 submissions to date.

Admittedly, this is considerably more than the days of the Liechtenstein Disclosure Facility (LDF), under which there were some 7,607 registrations and 6,576 disclosures submitted by 3 May 2016 (per HMRC's published statistics), and that initiative ran for over six years. But does that mean good news for the Exchequer?

In its time the LDF secured an average 'yield' of between £150,000 and £200,000 per disclosure, quite consistently (figures taken from HMRC's old publications). I personally recall handling several cases (when I worked at HMRC!) worth between £5–10 million in tax, interest and penalties, and even a case of siblings for which the settlement was worth in excess of £10 million. There were plenty of disclosures worth over £1 million, too. HMRC's statistics published in March 2016 showed that a total of £1.3 billion had been secured via the LDF and there will have been more too as many disclosures had not been concluded by that date.

So by contrast these WDF disclosures only averaged a little over £16,000 each. Looking more closely, the disclosures submitted in 2016 averaged at £14,146 each, in 2017 £11,725, in 2018 £12,051 and in 2019 £20,705 (the highest). I've not read too much into the 2020 figures as we were part way through the year and the Coronavirus pandemic (it had to be mentioned, I tried not to!) is very likely to have affected the volume of disclosures being registered and submitted.

Even the Crown Dependencies' disclosure facilities, between them averaged approx. £30,000 per disclosure. The respective terms were not as generous as the LDF and there were more entry restrictions, so we might have expected the WDF statistics to mirror these more or have been higher.

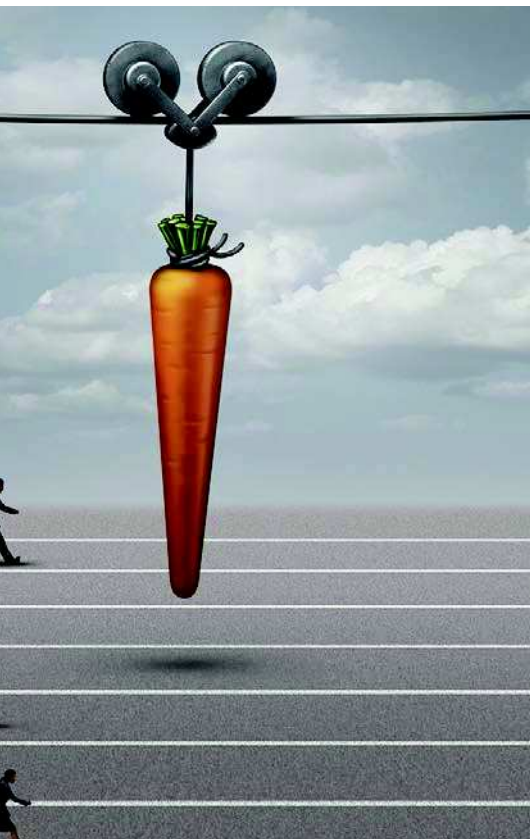
The LDF statistics look better than others for HMRC, so I reconsidered why that was. Are all newer/WDF disclosures simply smaller? Did HMRC's Single Points of Contact (SPOCs in the LDF days) add tangible value to and encourage complex and sizeable disclosures? Were all earlier disclosures simply 'low hanging fruit'?

If the latter is true, then what about all the voluntary disclosures made under even older offshore tax disclosure initiatives (which were comparatively small), like the Offshore Disclosure Facility (ODF) in 2007 and New

Disclosure Opportunity (NDO) in 2009?

My personal view mirrors that of many practitioners. I consider the work of SPOCs at HMRC during the LDF era to have injected a form of challenge and some balance. They tried to ensure precedents were followed and not unreasonably abandoned or challenged, they provided some flexibility as to how facts could be interpreted where the tax analysis was reasonable/correct, and provided significant certainty to both tax advisers and their clients. I believe this led to more disclosures, because clients knew the likely outcomes. Not to forget the low fixed 10% penalties (up to 2009) and immunity from criminal tax investigations. There were definitely carrots designed to really encourage would-be disclosers to come forward voluntarily.

Anecdotally, I understand there are plenty more disclosures to be made like those, of similar sizes and complexity. But they need even more encouragement where there is no carrot.



I am mindful the many more disclosures made via the WDF included many non-UK resident trustees, accounting for items like UK sourced income, capital distributions matched to gains, inheritance tax exposure, and remittances etc. This is likely to be the only or primary reason for the higher volume of disclosures. Again, anecdotally and from experience, I note the overwhelming number of such trustees registering for the WDF before they had confirmed any UK tax exposure. This resulted in many clients making £nil disclosures, but seizing the opportunity to set out the facts in the hope that HMRC's acceptance of their disclosures acted as some sort of post event clearance or ruling.

As practitioners, we now have little left to encourage would-be disclosers to come forward. Instead we rely on explaining what happens if those clients don't come forward voluntarily. In other words, the financial penalties will be even higher and it is far easier for HMRC to publish details about them now too. HMRC consider this to be the right approach for them – bizarrely only focusing on deterrents to encourage voluntary compliance.

Personally, I still believe the larger number of disclosures under the WDF to have been directly influenced by the volume of informal written prompts (aka 'nudge' letters) sent by HMRC. Those letters confirmed that HMRC had information from other counties, about non-UK financial accounts, and recommended WDF disclosures be explored. Still, I strongly consider that HMRC can do better in this regard, because they have data about 'millions' of such accounts and continue to receive them year on year.

I also asked HMRC for other information, broadly:

- Confirmation as to how HMRC distinguishes between disclosures received that were: (i) unprompted voluntary, (ii) prompted but still voluntary or (iii) prompted by an enquiry or investigation;
- Confirmation as to how many informal letters and formal notices have been sent following receipt of data from overseas;
- Confirmation as to how recipients responded to informal letters;
- Various statistics re use of the asset-value based penalty under FA 2016, Sch 22; and
- Various statistics re use of the offshore asset moves penalty under FA 2015 Sch 21.

However, HMRC declined to assist us in this regard, saying that replying "... would likely prejudice the assessment or collection of tax..." and that "providing it would exceed the FOIA cost limit... equates to one person spending 3½ working days locating and extracting all of the information requested."

I also queried the existence of and operations of HMRC's Offshore Co-ordination Unit (OCU) which has not been heard of much since the days of HMRC's Specialist Investigations. HMRC have confirmed the OCU is no longer in place but that an 'Offshore' team was created in its Risk & Intelligence Service (RIS) directorate in September 2018 "to support customer compliance, wider HMRC activities, and cross Government partners. It serves as a co-ordinated centre for Offshore intelligence and data acquisition, risk identification and development. The primary strategy which drives RIS Offshore activity is the No Safe Havens (NSH) strategy which was first published in 2013..."

In practice, the change seems subtle to me. I was working at HMRC from 2004 until early 2015 and spent several years as the Head of London's Offshore Disclosures/LDF team, and then as a Policy Leader in Whitehall (as part of NSH/Offshore Evasion Strategy team). I know first-hand that the OCU's role was to co-ordinate and also carry out some investigations, most notably involved in the UK-Swiss tax co-operation agreement. The new Offshore team appears to do similar things to the OCU.

This push into RIS represents a significant loss of that senior and experienced resource working on offshore tax risks, structures and general front-line understanding. This change further suggests that HMRC are not deploying offshore tax specialists on such enquiries, investigations and disclosures. Instead, they are treating offshore tax non-compliance activities as business as usual; for example WDF disclosures under their 'campaigns' strategy. In practice these disclosures are risk assessed automatically on submission and escalated if deemed necessary and only then manually risk assessed. So some, not all, will make their way to tax inspectors for follow-up. I could speak about this forever!

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