Extension of Offshore Time Limits
Response from the Low Incomes Tax Reform Group (LITRG)

1. Executive Summary

1.1. We welcome the opportunity to comment on the proposals to extend the time limits for HM Revenue & Customs (HMRC) to raise discovery assessments in offshore cases involving non-deliberate error.

1.2. While we support the principle that everyone should pay all the tax they owe according to UK law, including on offshore income, gains and chargeable transfers, we remain unconvinced of the justification to double or triple the existing time limits for those whose tax affairs involve an offshore element, including cases where 'reasonable care' is taken. We cannot see how this is a fair proposal from the perspective of the taxpayer, particularly when offshore matters can be so complicated.

1.3. In particular, we think it undesirable that the government is introducing these major changes (for income tax, at least) without any consultation on the basic principle, which would normally be required under stated government policy. This would have provided the government with valuable evidence to demonstrate that these proposals have the biggest impact on innocent taxpayers who simply do not deserve to be targeted.

CHARTERED INSTITUTE OF TAXATION
1st Floor, Artillery House, 11-19 Artillery Row,
London, SW1P 1RT

REGISTERED AS A CHARITY NO 1037771

Tel: +44 (0)20 7340 0550
Fax: +44 (0)20 7340 0559
E-mail: litrg@ciot.org.uk
www.litrg.org.uk

UK REPRESENTATIVE BODY ON THE
CONFEDERATION FISCALE EUROPEENNE

1.4. We agree that specific measures should be introduced to tackle offshore tax evasion, which is defined as 'using another jurisdiction's systems with the **objective** of evading tax'[1]. However, this proposal specifically targets those who have avoided tax without such an objective. The individuals affected will therefore be those who are **not** aware that they may have an unreported liability and who have conducted their financial affairs in good faith. In order to increase levels of compliance in this group, the focus should be on educating them about the need to disclose these liabilities, rather than denying these taxpayers the closure and certainty of the normal time limits.

1.5. Threatening letters from HMRC cause a great deal of unnecessary distress, especially when the taxpayer is vulnerable, even if the amounts involved are trivial. In our experience and from insight garnered from the charity Tax Help for Older People[2], the vast majority of taxpayers who have undisclosed liabilities related to offshore investments will want to be compliant upon simply being made aware of the error; the threat of penalties or criminal prosecution is unnecessary.

1.6. The new proposals, particularly those on their commencement, add complexity to existing rules on time limits, for example those relating to notification of chargeability, tax return enquiries, discovery assessments, overpayment relief and the new Requirement to Correct (RTC). A number of inequities arise as a result, which we attempt to highlight in our response.

1.7. In our recommendations on the design of the legislation, we advocate alignment to existing scope and definitions wherever possible, favouring simplicity over complexity and providing for fairness and certainty for the taxpayer.

1.8. Specifically, we would like to see the draft legislation allow retrospective claims for the remittance basis, relief under a Double Tax Treaty and Foreign Tax Credit relief – each of which may offset or eliminate the UK taxes due – where time limits for such claims are legislated separately.

1.9. Finally, we would also like to see provision in the legislation to prevent an assessment being made under the extended time limits where the undisclosed liability (net of any reliefs to which the taxpayer would have been entitled) is trivial. We feel that this is necessary to ensure that HMRC's efforts are focussed on cases where the Potential Lost Revenue (PLR) is significant and not, for example, on taxpayers who receive a small amount of interest on an overseas bank account, on which foreign taxes are paid in any event.

---

[1] Paragraph 2.3 of the consultation document, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/682110/Extension_of_Offshore_Time_Limits_consultation_document.pdf

[2] http://www.taxvol.org.uk

1.10. For the avoidance of doubt, our comments on the design of the legislation should not be taken as endorsement of the principle of extending these time limits, which we oppose. However, if the extended time limits are to be introduced in any case, we hope that our recommendations are adopted so that the impact on the low-income unrepresented taxpayer is mitigated as far as possible.

2. About Us

2.1. The Low Incomes Tax Reform Group (LITRG) is an initiative of the Chartered Institute of Taxation (CIOT) to give a voice to the unrepresented. Since 1998 LITRG has been working to improve the policy and processes of the tax, tax credits and associated welfare systems for the benefit of those on low incomes. Everything we do is aimed at improving the tax and benefits experience of low income workers, pensioners, migrants, students, disabled people and carers.

2.2. LITRG works extensively with HM Revenue & Customs (HMRC) and other government departments, commenting on proposals and putting forward our own ideas for improving the system. Too often the tax and related welfare laws and administrative systems are not designed with the low-income user in mind and this often makes life difficult for those we try to help.

2.3. The CIOT is a charity and the leading professional body in the United Kingdom concerned solely with taxation. The CIOT's primary purpose is to promote education and study of the administration and practice of taxation. One of the key aims is to achieve a better, more efficient, tax system for all affected by it – taxpayers, advisers and the authorities.

3. General comments

3.1. *The extension to 12 years*

3.1.1. We do not agree with the proposal to extend time limits, but we note the consultation is not inviting comment on whether or not the 12-year time limit is appropriate or proportionate in tackling offshore tax non-compliance in non-deliberate cases. HMRC's stated justification is that it takes longer to gather the facts in order to make an assessment involving offshore structures and investments. However, we note the disparity between HMRC allowing themselves more time to make an assessment where an offshore element is involved, and the taxpayer not being given any such extension in, for example, notification of chargeability or filing a self-assessment tax return where there is an offshore element, despite the same hurdles of obtaining information from overseas sources being present. This is particularly challenging for the taxpayer where the offshore income source is inherited.

3.1.2. We feel strongly that HMRC should focus on improving the processes involved in establishing the facts of an offshore case, rather than simply giving themselves more time to gather them. The latter approach is manifestly unfair from the perspective of a taxpayer who has investments overseas but takes equal care over their UK tax affairs compared with someone whose tax position is purely domestic.

3.1.3. Given that a 20-year time limit applies in cases of deliberate error in any case, these provisions are targeted towards those individuals who make a non-deliberate error under any circumstances, no matter how trivial the magnitude. This strikes us as disproportionate and unfair, particularly given the complexity of the legislation which the unrepresented taxpayer is required to navigate. This is especially true in the case of migrants, whose English language skills may make the task effectively impossible.

3.1.4. Under the proposals, taxpayers with offshore investments who have taken 'reasonable care' over their affairs will find that the discovery assessment window is extended by eight years (tripling the 'normal' time limit), but taxpayers who have not taken the same 'reasonable care' have their discovery assessment window extended by only six years (doubling the time limit). Thus a taxpayer who has taken reasonable care is more adversely affected by the proposals than a 'careless' taxpayer, and those who have deliberately avoided tax face no extension at all, which feels somewhat perverse.

3.2. ***Taxpayer communications***

3.2.1. If it is felt that mistakes are made relating to non-disclosure of offshore matters, leading to lost tax revenue, renewed efforts should be made in educating the taxpayer that offshore investments are – depending on the circumstances – liable to UK tax. As we pointed out in our response[3] to the consultation on the RTC regulations[4], many unrepresented taxpayers will not have disclosed offshore matters to the UK authorities simply because they lack the understanding that these are in scope of UK tax. They are not deliberately evading tax, they do not identify themselves as tax evaders and therefore they are not encouraged to be more compliant because of legislation designed to target offshore tax evasion. Simply put, they feel it does not apply to them.

3.2.2. It is quite distressing for many taxpayers to receive correspondence from HMRC which suggests they have been non-compliant and therefore 'dishonest'[5]. We urge HMRC to consider how to communicate sensitively with vulnerable taxpayers when raising a potentially undisclosed liability, given that opening the letter from HMRC will often be the first point at which they become aware that they may have done something wrong. We feel that the ability for HMRC to raise assessments which are up to 12 years old will exacerbate this distress, particularly in cases where the taxpayer has no longer retained records relating to the year in question (see 3.3.3). In addition, having 12 years potentially subject to a

---

[3] https://www.litrg.org.uk/sites/default/files/files/170123-LITRG-response-FB2017-cl94-requirement-correct-certain-offshore-tax-non-compliance-FINAL.pdf

[4] s67 and Sch 18, F(2)A 2017

[5] According to a website enquiry received by us on 25 October 2017

discovery assessment rather than either four or six will presumably increase the probability of receiving one at any given moment. Thus the discovery assessments will relate to tax years from longer ago and be more frequent.

3.3. ***Interaction of the proposals with existing legislation***

3.3.1. We would like to highlight the interaction of the proposals with s36(1A)(b) TMA 1970, under which a 20-year time limit applies[6] where no notification of chargeability has been given under s7 TMA 1970. Many low-income taxpayers with trivial amounts of offshore income will not have considered themselves liable to provide a notification of chargeability as in practice it equates to registration for self-assessment, which continues to be associated with the wealthy and self-employed. Therefore, in communicating the new time limits to taxpayers, we urge HMRC to take the opportunity to remind individuals of the importance of registering for self-assessment as well as educating them on the taxability of income received from abroad. Failure to do so would result in a disproportionately long assessment window usually reserved for those who have engaged in fraudulent tax evasion. Furthermore, taxpayers reading about new time limits relating to offshore matters may conclude the new time limits are applicable to them, without realising that the 20-year time limit would apply in any case if they have neglected to notify chargeability.

3.3.2. In connection with the above we might also suggest that the concessions allowed in respect of requiring individuals to register for self-assessment[7] are extended such that taxpayers with a de minimis amount of foreign income on which no UK tax is payable (for whatever reason) are exempted from the obligation to notify chargeability and complete a tax return, provided they do not meet any of the other criteria requiring them to register for self-assessment.

3.3.3. The new proposals add a further layer of complexity to the question of when closure is achieved for a given year, when considered alongside the existing time limits for a s9A enquiry, a s29 discovery assessment (each under TMA 1970) and indeed the RTC regulations. A taxpayer needs to have clarity about how long to keep financial records and these proposals obscure that clarity. In particular, not being aware they have made an error, many taxpayers will feel they can legitimately destroy records which are more than four years old. This will leave them unable to defend themselves if an assessment is made at a later date which they feel to be incorrect, especially as it will be very difficult, potentially impossible, for them to obtain duplicates of statements or other financial information from overseas third parties when that information is so aged.

3.3.4. In one example from our experience, HMRC had asserted to a widowed taxpayer that her husband had siphoned funds offshore whereas in fact they were inherited from an overseas

[6] If the tax loss relates to 2008/09 or earlier, Article 7 of SI 2009/403 stipulates that the tax loss must also be attributable to negligent conduct.

[7] https://www.gov.uk/self-assessment-tax-returns/who-must-send-a-tax-return

relative. No bank statements were available and the only evidence available came from the memory of a retired solicitor overseas, who had agreed that the funds were placed in the husband's name. HMRC eventually stood down owing to lack of evidence to support their case, but not without having caused the taxpayer significant worry and distress that she might lose her inheritance.

3.3.5. We also note the obvious overlap with the RTC regulations, under which undisclosed UK liabilities on offshore matters assessable at 5 April 2017 remain assessable for a further four years and with harsh Failure to Correct (FTC) penalties applying from 1 October 2018 if the liabilities are not disclosed by that date. It would seem that the extension of time limits proposals furtively extend the scope of the FTC penalty regime, as a tax year would have its discovery assessment window initially extended by RTC and then extended again under the new proposals. For example, if a taxpayer has an undisclosed liability relating to an offshore matter in 2013/14 despite taking reasonable care, RTC extends the assessment deadline for this year from 5 April 2018 to 5 April 2021. Because this year is now assessable at 6 April 2019, the extended time limit rules extend the assessment deadline to 5 April 2026. If the liability was not disclosed by 30 September 2018, and our understanding is correct, the taxpayer is potentially subject to a FTC penalty of 200% of the PLR until 5 April 2026. However, when the FTC penalties were originally introduced alongside RTC, it was understood they would only be applicable to 5 April 2021. If the FTC penalty regime operates in this way for those who have made non-deliberate errors, it should be publicised accordingly, but in any case we feel this is too punitive an approach.

3.3.6. We note that while there is a reference to extending the time limits for assessing penalties alongside the additional tax, there are no proposals to extend the time limit for making a repayment claim, which remains at four years[8]. This is another example of the way in which the proposals appear to be unbalanced.

3.4. ***Mitigating factors***

3.4.1. UK income tax may not be due on income from offshore investments in a whole range of scenarios, most notably where the income falls within individual allowances or the savings nil rate, or if the individual was non-resident in the year, or in the circumstances discussed in Section 8 below (i.e. relief under the remittance basis, a Double Tax Treaty or Foreign Tax Credits). As the new proposals are applicable to tax years prior to 6 April 2016, it is also relevant to point out that overseas dividends will attract a notional tax credit, which in most cases would offset any UK tax due.

3.4.2. Our colleagues at Tax Help for Older People receive a number of enquiries from individuals in the above situations who receive intimidating and threatening letters from HMRC, particularly in connection to the Worldwide Disclosure Facility (WDF). In many cases there is

[8] Sch 1AB paras 1, 8, TMA 1970; Sch 18 paras 51–51G, FA 1998

no tax yield and the individual, not being able to afford advice, is forced to approach a charity to get confirmation that no taxes are due. If there is an underpayment, it may have arisen because a taxpayer has (understandably) concluded that an investment which is tax-free in the offshore jurisdiction is also tax-free in the UK, even if it is not[9]. Alternatively, a joint holder of an offshore investment may be unaware of it (for example, if the spouse puts an investment in joint names and takes responsibility for paying the tax). As we would expect an increase in the number of cases like this once the new extended time limits are introduced, we hope that HMRC staff are sensitive to the circumstances of these individuals and will be prepared to provide more support, given that in the vast majority of cases they have not thought they were doing anything wrong.

3.4.3. Unrepresented taxpayers can make these errors entirely innocently. A common misunderstanding among this group is that income from offshore investments is taxable in the offshore jurisdiction and as such it is not taxable in the UK – it is simply not intuitive for the layman to consider that such income might also be taxable in the UK. Those without the ability to afford professional advice and whose offshore investments are small are particularly likely to make this mistake. This is especially the case for the following groups:

- older taxpayers, who are more likely to have offshore funds that are inherited as opposed to actively invested, so they are less likely to have considered whether the investment requires any ongoing action on their part to be tax-compliant.

- migrants, whose first language is unlikely to be English and who may therefore struggle to navigate the complex rules on the taxation of offshore income and gains, but who are nonetheless fairly likely to have offshore investments prior to their arrival in the UK or inherited from relatives overseas.

3.4.4. It is a general feature of the current law that the circumstances leading to the error determine the length of time which HMRC have in order to raise a discovery assessment. We agree with this as a matter of principle and continue to maintain that the time limits should not be increased at all where the error is not deliberate. However, in order to minimise the erosion of this feature, we suggest that if this proposal proceeds, the extended time limits only apply in special circumstances – for example, where there is a sufficient degree of evidence that the PLR exceeds a certain figure. Such an approach would ensure that the increased powers to raise a discovery assessment are only exercised when it is worthwhile to the Exchequer.

3.4.5. In general, HMRC should consider how to target all assessments – whether or not under the extended time limits – so as not to waste time chasing undisclosed offshore matters or transfers where the PLR is nil or negligible. The approach taken by HMRC in assessing trivial amounts under the WDF (where the net amount due is no more than £50, for example),

[9] One example of this would be the French 'Livret A' account, which is similar to a UK Individual Savings Account (ISA).

could be formalised or legislated. Such an approach will also avoid the unnecessary distress that being investigated by HMRC causes to a taxpayer, which the new proposals will cause to be more commonplace.

3.5. We set out our answers to the specific consultation questions below.

4. Q1. In addition to the taxes above, what (if any) other taxes (for example, CT) should we look to include within scope, and why?

Q2. Do you foresee any difficulties for extension to other taxes and are there any potential solutions to address these?

4.1. We do not feel that any additional taxes should be sought to be included within scope of the new proposals, not least because we feel these proposals should be as limited as possible in scope.

4.2. In particular, we note that the RTC regulations do not include Corporation Tax and we do not consider there to be a case for the extended time limits to apply across a different tax base. Similar arguments apply in respect of whether or not to extend the proposals to other taxes, such as VAT. It would clearly be undesirable and nonsensical for a taxpayer (including a corporate entity) to be within scope of one regime designed to tackle offshore tax evasion (the extended time limits) and not another (RTC) simply because of their legal structure. This would also lead to complexities regarding how the two regimes interact (see 3.3.5 and 7.4).

5. Q3. What are your views on the proposed definitions?

5.1. We consider that it is sensible to match the existing definitions for ‘offshore matter’ and ‘offshore transfer’ which apply in respect of the RTC regulations, for reasons of simplicity.

5.2. However, we note that the term ‘offshore transfer’ is already defined in the remittance basis rules[10] where it refers to a transfer between two overseas bank accounts, while in the RTC rules it refers to a transfer from the UK to overseas. It is difficult to see how this can be resolved without amending existing law, so we suggest that HMRC’s guidance highlights this anomaly.

6. Q4. What are your views on the proposed scope of this rule?

6.1. We also note the scope for ambiguity and confusion over quantifying the ‘offshore tax’ where the inclusion of the undisclosed offshore income in a UK tax calculation results in additional UK tax being payable. ‘Offshore tax’ is defined in the consultation document as the additional UK tax ‘referable’ to the offshore matter. But the ‘foreign tax’ (i.e. the tax

[10] s809R(5), ITA 2007

charged by the *overseas* jurisdiction on the income) is also likely to be a consideration in such cases. It is disappointing that the term 'offshore tax' was legislated[11] under RTC and we urge that (as in 5.2, above) HMRC's guidance seeks to minimise any confusion.

6.2. It is proposed that the tax is apportioned on a 'just and reasonable basis' in cases where both 'offshore tax' and 'onshore tax' is involved in order to determine the amount referable to the offshore matter or transfer. However, one alternative for this calculation – which would give the taxpayer greater certainty – might be to mirror the calculation used in Foreign Tax Credits[12] for the amount of UK tax attributable to income which is taxed in the UK and overseas. In other words, the taxpayer would calculate the difference between the total UK tax payable when the offshore matter or transfer is included and when it is not included. Given that many offshore cases will involve Foreign Tax Credit calculations, it would appear to be sensible to align these definitions as they seek to quantify the same concept.

7. Q5. What are your views on the proposed commencement rule?

7.1. We agree that the legislation should not apply retrospectively and that tax years should not become assessable under the new proposals if the discovery assessment window had already expired in respect of that year.

7.2. However, we are concerned that the proposed rules have an indirect retrospective effect. Under the proposals, the discovery assessment windows of 'closed' tax years are being extended by up to eight years. Therefore, even 'careful' taxpayers would need to make arrangements to retain historical records for these tax years for a longer period than what was understood when those records were originally stored. Taxpayers using third party archiving or storage would need to ensure that the retention durations are extended. In either case, this is likely to involve an additional cost.

7.3. It is our opinion that the proposals would encourage taxpayers to take greater care over their affairs because of a potentially longer discovery assessment window. Consequently, some taxpayers will clearly be prompted to review prior years under the threat of an assessment up to 12 years in the future. However, it is already the intention of the RTC rules to encourage a taxpayer to review their historical affairs to get them in order. Therefore, in terms of prior tax years, the two measures have an overlapping effect. Accordingly, we feel the scope of the extended time limit proposals should be limited in this regard.

7.4. Indeed, a prior tax year which is assessable at 5 April 2017 will remain assessable until 5 April 2021 under RTC, and these proposals will capture all tax years assessable at 5 April 2019 and hence every tax year assessable under RTC. This means that the RTC extension

[11] Sch 18, para 13(9), F(No. 2)A 2017

[12] s36, TIOPA 2010

date of 5 April 2021 never actually applies in practice, because the tax years affected by RTC - from 2013/14 to 2015/16 (plus 2011/12 to 2013/14 in cases of careless behaviour) - each have their discovery assessment windows extended again under the 12-year rule. Thus, the RTC extension serves simply to augment the retrospective impact of the new time limits.

7.5. In light of the above we would advocate a simpler commencement rule: the new time limits only apply to tax years 2019/20 onwards. While we acknowledge this would leave the 2017/18 and 2018/19 tax years unaffected by either RTC or these proposals, it would have the advantage of being easier to communicate to taxpayers and would be truly non-retrospective.

8. Q6. In your view, are there any other considerations that HMRC should take into account when considering the design of this measure?

8.1. While we welcome the retention of the safeguards mentioned in paragraphs 3.10ff of the consultation document, we do not consider that the proposals can be argued to be balanced as they weigh heavily in HMRC's favour. As we have made clear, we oppose the proposals in their current form and we urge that the following specific considerations are made in designing the legislation to mitigate their impact.

8.2. One of our principal concerns is that assessments under the extended time limits do not result in more tax payable than what would have been due if the taxpayer had disclosed the offshore matter or transfer fully at the time, that is, taking into account any exemptions and reliefs that would have been available.

8.3. Specifically, for a non-domiciled individual for whom the remittance basis would apply automatically (i.e. without a claim)[13], overseas income and gains assessed under the new time limits should not be assessable to UK tax if they are retained offshore. Consideration should also be given as to whether a claim to the remittance basis[14] would be possible retrospectively if it did not apply automatically.

8.4. Secondly, where an individual would have been entitled to relief under a Double Tax Treaty such that either the overseas source of income is exempt from UK tax or otherwise a Foreign Tax Credit claim is possible, such an exemption or relief should be allowed in making an assessment under the extended time limit provisions. For example, a UK-domiciled individual who is resident in the UK under UK domestic law and has bank interest arising in France would be assessable to UK tax on that interest in the first instance under UK domestic law. However, if the individual also has tax residence in France and is considered under

[13] ss809D-809E, ITA 2007

[14] s809B, ITA 2007

Article 4 of the UK-France Double Tax Treaty[15] to be resident in France for the purposes of the treaty, then Article 12 states that the French bank interest should only be assessable in France and not in the UK. The treaty would then override the domestic position.

8.5. Thirdly, where it is not possible to exclude overseas income from UK tax entirely under either the remittance basis or under the terms of a Double Tax Treaty, a Foreign Tax Credit is allowed (either under the terms of a treaty[16] or otherwise unilaterally under UK law[17]) to reduce the UK tax payable on the foreign income or gains if foreign taxes have been paid on that same income or gain. Again, retrospective claims to Foreign Tax Credit should be allowable in a similar way.

9. Q7. Do you have any comments on the assessment of equality or other impacts?

9.1. As mentioned throughout our response, we note the unfairness in that fact that these measures specifically target those who make non-deliberate errors while ignoring those who make deliberate errors. Even within this, they will have a more detrimental impact on those who have taken reasonable care compared to those who have been careless. Therefore, we consider that the impact of the proposals is very poorly targeted indeed.

9.2. We are also gravely concerned that the groups mentioned in paragraph 3.4.3 (i.e. older taxpayers and migrants) may be more adversely affected by these proposals than other taxpayers by virtue of the protected characteristics of age and race. Older taxpayers, because they are more likely than the rest of the population to be without internet access and therefore more troubled by letters from HMRC that mean little or nothing to those who cannot access the links they contain. They are also unable to consult advisers because of their lack of means. Migrants, because they are more likely to have offshore assets (in their home country) and because of language difficulties they are less likely to be able to understand letters sent to them in the official English commonly used by HMRC compliance teams. Accordingly, the proposals may fall foul of the public sector equality duty under the Equality Act 2010. The government would therefore be legally obliged to ensure that steps be taken to remove or minimise the disadvantages suffered by these taxpayers as a result of the proposals.

LITRG
11 May 2018

---

[15] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/496672/france_dtc_-_in_force.pdf

[16] ss2, 18, TIOPA 2010

[17] ss8, 18, TIOPA 2010