Extension of offshore time limits
Consultation on draft clause 33, Finance Bill 2018-2019
Response from the Low Incomes Tax Reform Group (LITRG)

1 Executive Summary

1.1 LITRG welcomes the opportunity to comment on draft clause 33 for Finance Bill 2018-2019 in relation to the time limits for assessments involving offshore matters: IT and CGT.

1.2 We are pleased to learn that the Government will not be extending the proposals to Corporation Tax. We are also note the confirmation that a taxpayer's right to make a claim against an additional tax liability charged by an assessment will apply where that assessment is made under the Extended Time Limits (ETL) legislation.[1] However, we do not see this made explicit in the draft legislation and would recommend that it is made legislatively clear.

1.3 We also welcome the exclusion whereby the new time limits do not apply in cases where HM Revenue & Customs (HMRC) could reasonably have been expected to be aware of the lost tax as a result of information received from mandatory automatic exchange agreements, notably the Common Reporting Standard (CRS).[2] We are though concerned that the draft clause includes an additional condition for the above-mentioned exclusion such that it only applies where 'it was reasonable to expect the assessment to be made before [the] time

[1] Paragraph 3.34, *Extension of Offshore Time Limits – Summary of Responses* (6 July 2018): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/722947/Extension_of_Offshore_Time_Limits_summary_of_responses.pdf

[2] Draft s36A(7) TMA 1970, as inserted by clause 33(2), Finance Bill 2018-2019

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limit'.[1] Given that the original rationale for extending the time limits was that the Government considered it unreasonable for HMRC to make assessments of offshore tax within the existing time limits, owing to the fact it takes longer to establish the facts in such cases, the exclusion would appear to have limited effect. We recommend deletion of sub-paragraph 7(b) of new section 36A of TMA 1970. Otherwise, what is 'reasonable' in this instance should be defined in terms of the time between the receipt of the information and the consequent assessment, no more than 30 days.

1.4 We are also disappointed that our remaining recommendations have been overlooked. In particular, the fact that the rules on commencement continue to have a retrospective impact. The wording of the draft clause at 33(5) on this point even makes this impact explicit. We recommend that this is amended such that the rules apply for tax years 2019/20 onwards only.

1.5 Furthermore, rather than expecting the taxpayer to rely on the statement made in paragraph 3.43 of the *Summary of Responses* that 'In general, HMRC do not seek to raise assessments where the cost of doing so will be greater than the tax at stake', we would have preferred to see the legislation include an explicit de minimis.[2] This would bring the law in line with both common sense and standard practice, as well as give taxpayers greater certainty and protection.

1.6 The Government also appears to be ignoring the impact of the new proposals on older and/or migrant taxpayers, as highlighted in our response to the original consultation. It is concerning that the Government appears to believe that the groups affected by the proposals 'are likely to have above average wealth'.[3] We cannot see any statistical analysis to support this claim, and even if it were correct, the proposals would still have an effect on the low-income groups we highlighted originally. Regardless of whether these groups are in the minority, this is no basis for the public sector equality duty not to apply and we strongly believe that safeguards should be introduced to reduce the stress and anxiety suffered by vulnerable taxpayers as a result of an unexpected tax assessment.

1.7 We also feel that the Government has reached misguided conclusions on the impact of record keeping requirements. While we support the Government's intention not to increase the statutory record keeping requirements in the UK, we feel that many cautious taxpayers with offshore elements to their tax affairs will retain records for 12 years by default to

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[1] Draft s36A(7)(b) TMA 1970, as inserted by clause 33(2), Finance Bill 2018-2019

[2] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/722947/Extension_of_Offshore_Time_Limits_summary_of_responses.pdf

[3] Paragraph 3.44, *Extension of Offshore Time Limits – Summary of Responses* (6 July 2018): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/722947/Extension_of_Offshore_Time_Limits_summary_of_responses.pdf

ensure they are able to defend against any future claim. This will increase administration burdens for both businesses and individuals. Furthermore, we are concerned for the impact on a taxpayer who is unable to defend themselves against a discovery assessment made after four years where the records required for that defence have been destroyed after the minimum statutory period. Short of abandoning the proposals altogether, it is difficult to see how these two concerns can be addressed.

1.8 Finally, there continue to be a number of areas which we trust the Government will provide proper and clear guidance on when the law comes into force. These include for example: the interaction of ETL with the Requirement to Correct (RTC) legislation and other rules on time limits; clarity over the confusing and ambiguous term 'offshore tax', and a far stronger commitment to those taxpayers who struggle to communicate with HMRC and comply with their tax obligations because English is not their first language.

2 About Us

2.1 The 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 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 Recommended amendments for draft legislation

3.1 Further to paragraph 3.34 of the Government's *Summary of Responses* document, in order to protect a taxpayer's ability to make a claim against an additional tax liability charged by an assessment, we recommend that this right be made explicit in clause 33.[1] In particular,

[1] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/722947/Extension_of_Offshore_Time_Limits_summary_of_responses.pdf

retrospective claims to the remittance basis, relief under a Double Tax Treaty and Foreign Tax Credit relief should be allowed where an assessment is made under ETL.

3.2 We recommend deletion of sub-paragraph 7(b) of new section 36A of TMA 1970:

'(7) But an assessment may not be made under subsection (2) if -
(a) before the time limit that would otherwise apply for making the assessment, an officer of Revenue and Customs received information from overseas by mandatory automatic exchange on the basis of which the officer could reasonably have been expected to be aware of the lost tax, *and*
(b) it was reasonable to expect the assessment to be made before that time limit.'

3.3 The reason for this additional sub-paragraph and condition is not clear to us. There does not appear to be anything which prevents HMRC from relying on sub-paragraph 7(b) to claim that, for example, owing to internal resource constraints they were unable to make the assessment within the normal time limits, which is the argument being used for the introduction of ETL in the first place.

3.4 If sub-paragraph 7(b) is to be retained, we recommend that what is 'reasonable' be defined clearly. For example, we consider that it is reasonable for HMRC to make any assessment within 30 days of receiving the relevant information and no later, rather than effectively a variable time period depending potentially on the size and complexity of the data set received from overseas.

3.5 We fail to see how the Government can claim that the rules do not have a retrospective impact when sub-paragraph (5) of clause 33 makes it clear that the amendments apply to 2015/16 and subsequent years (or 2013/14 in the case where the loss of tax has been brought about carelessly). The original consultation document[1] stated, in paragraph 4.13, that 'the new legislation will not apply retrospectively', but we think that the legislation interprets retrospection erroneously. The key issue in terms of whether or not something is retrospective is the tax year to which an assessment applies, not the time limit for assessments for that tax year. In order to ensure that the new legislation does not apply retrospectively, in a true sense, sub-paragraph (5) should be amended such that the rules apply for tax years 2019/20 onwards only.

3.6 As discussed in our response to the original consultation, we continue to recommend that HMRC legislates for a de minimis.[2] The approach taken by HMRC in assessing trivial amounts

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[1] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/682110/Extension_of_Offshore_Time_Limits_consultation_document.pdf

[2] Paragraph 3.4.5, https://www.litrg.org.uk/sites/default/files/180511%20Extension%20on%20offshore%20time%20limits%20-%20LITRG%20response%20-%20FINAL.pdf

under the Worldwide Disclosure Facility (WDF), e.g. where the net amount due is no more than £50, would provide a safeguard for vulnerable taxpayers for whom the distress and anxiety caused by an HMRC investigation does not justify the net gain for the Exchequer.

4 Other areas for consideration

4.1 It is disappointing that the Government's response to the widespread concern over the interaction of ETL with RTC is that the measures 'complement' each other, rather than the reality, which is that they overlap and cause complexity in their interaction.[1] In particular, as highlighted in our original response to the consultation, the harsh penalties under RTC of up to 200% of the Potential Lost Revenue (PLR) appear to have an extended impact by virtue of the ETL rules.[2] If the legislation is designed to have this effect, notwithstanding our objection to the principle, HMRC guidance should make this clear.

4.2 The term 'offshore tax' (the additional UK tax referable to the offshore matter) provides scope for confusion with the term 'foreign tax' (the tax charged by the overseas jurisdiction on the same income). We suggest the anomaly is highlighted in HMRC guidance to eliminate any ambiguity.

4.3 Given the disproportionate impact of these measures on migrants to the UK for whom English may present some difficulty, the Government's commitment to those who may require an interpreter is disappointing. The website referred to in the *Summary of Responses* document simply advises a taxpayer to 'get a friend or family member' to interpret on their behalf.[3] If a taxpayer is unable to do this, it is stated that HMRC 'may' be able to organise an interpreter for the taxpayer, but there is no commitment that they will do so, no instruction on how the taxpayer might go about that request and no details given in a language other than English. This potentially prevents those taxpayers who simply wish to comply from achieving their objective.

LITRG
30 August 2018

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[1] Paragraph 3.23, *Extension of Offshore Time Limits – Summary of Responses* (6 July 2018): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/722947/Extension_of_Offshore_Time_Limits_summary_of_responses.pdf

[2] Paragraph 3.3.5, https://www.litrg.org.uk/sites/default/files/180511%20Extension%20on%20offshore%20time%20limits%20-%20LITRG%20response%20-%20FINAL.pdf

[3] https://www.gov.uk/dealing-hmrc-additional-needs/english-not-first-language