ACTION ITEM 12:
MANDATORY DISCLOSURE RULES

OECD
BETTER POLICIES FOR BETTER LIVES

Work to date on Mandatory Disclosure Rules

- The OECD has done significant work on this issue including producing a published report
- " Tackling Aggressive Tax Planning through Improved Transparency and Disclosure " (OECD Report, 2011)

  - The Report outlines the importance of timely, targeted and comprehensive information to counter ATP
  - Disclosure initiatives can help to fill the gap in identifying ATP schemes by tax authorities.
  - MDR have proven to be effective in providing relevant information thus allowing timely compliance responses

Expected Outputs

The Action Item 12 calls for:

- Recommendations regarding the modular design of mandatory disclosure rules
- Identifying the possibility of expanding the focus of MDR so that it might pick up cross-border ATP arrangements with no domestic tax benefit
- Addressing mechanisms that would allow tax authorities to share the information obtained

Timetable

- Due: September 2015
- Timeline [up to June 2014]

  Oct 2013: Initial discussion at WP11 meeting

  Nov 2013: Circulation of Issues Paper to FG

  Feb 2014: Circulation of Discussion Document to WP 11

  May 2014: Discussion of 1st Draft Report at WP11 meeting
- Working Method

  Focus Group 12 set up to assist WP 11

  Composition of FG: 15 countries

HM Revenue
& Customs

Tax avoidance disclosure regimes

Meeting of OECD Working Party 11

22 October 2013

Disclosing Tax Avoidance - Introduction

- Disclosure in context
- Overview of UK disclosure regimes
- Review of disclosure regimes
- Comparisons between the UK disclosure regimes and other jurisdictions

Disclosure in context

UK Anti-Avoidance Strategy

- **Preventing** avoidance at the outset where possible,
- **Detecting** it early where it persists, and
- **Countering** it effectively through challenge by HMRC

Detection

- Disclosure regimes
- Real-time working through Customer Relationship Managers
- Risk assessment and other intelligence-gathering methods

UK Disclosure Regimes

UK Disclosure Regimes

Disclosure of Tax Avoidance Schemes (DOTAS)

- Introduced in 2004
- Covers income tax, corporate tax, capital gains tax, property taxes and inheritance tax.
- Not intended to capture *all* avoidance
- Has been updated at regular intervals to strengthen and refine the regime

Separate disclosure regime for Value Added Tax ('VAT', sales tax)

Disclosure of Tax Avoidance Schemes (DOTAS)

DOTAS policy objectives

- To **provide early information** about tax avoidance schemes, allowing the Government, where appropriate, to introduce legislation closing them down before significant tax was lost;
- To **identify users** of disclosed schemes so as to challenge them operationally; and, ultimately
- To **deter the promotion and use of avoidance** by changing the economics of avoidance.

Disclosure of Tax Avoidance Schemes (DOTAS)

Main features

Who?

- Disclosure by **promoter** of the avoidance scheme, or **user** where schemes devised in-house, promoter is located offshore, or claims legal professional privilege.

What?

- Arrangements falling within **certain descriptions** ('hallmarks') which are expected to provide a **tax advantage** as a **main benefit.**
  - **3 generic** hallmarks to capture features indicative of avoidance: (i) confidentiality; (ii) a premium fee; (iii) standardised tax products.
  - **2 specific** hallmarks to target known risks e.g. losses, leasing.
  - There are separate descriptions to capture schemes relating to land and property tax and employment income.

HMRC Review of Disclosure Regimes International Comparisons

HMRC Review of Disclosure Regimes

Terms of reference

- Broad review of both DOTAS and VAT disclosure regimes:
  - Performance against policy objectives
  - Compliance with the regimes
  - Level of administrative burden for HMRC and externals
  - International comparisons between UK and OECD members

- To be completed by early 2014.

International comparisons - OECD survey

- Survey conducted as a element of BEPS Action Plan
  - Questionnaire sent to 22 ATP SG countries
  - Countries **with** Mandatory Disclosure Regimes ('MDR') & Countries **without** MDR

- Purpose of Survey
  - Practical issues in the implementation of MDR
  - Reasons for not introducing MDR
  - Differences between UK regime and other MDRs

Countries without mandatory disclosure regimes

Reasons for **not** introducing MDR

Reason	number of responses
Resistance from taxpayers and advisers	9
Costs to administer	6
Other disclosure rules working effectively	6
Usefulness of information collected	3
Low priority given level of promoter activity	2

Countries without mandatory disclosure regimes

UK experience and lessons learned

- Disclosure regimes need to be carefully targeted
  - Narrow regime reduces risk of over-disclosure
  - Targeted disclosure rules ensure information will be useful

- Promoter-based regime - information directly from the source

- Disclosure accepted by promoters as part of the planning process

- Cost effective: Resource costs vs benefits are good, e.g.
  - Over 100 legislative measures informed by disclosure since 2004

Countries without mandatory disclosure regimes

Perceived advantages of MDR

Perceived advantage	number of responses
Earlier disclosure of ATP schemes	10
Identify which taxpayer has used	9
Better deterrence	8
Better disclosure of scheme details	7
Improved certainty of outcomes	5
Penalty regime to capture promoters	3

Countries without mandatory disclosure regimes

UK experience and lessons learned

- Deterrent effect
  - Pressure on avoidance market, as promoters only get one opportunity to implement schemes before closed down
  - Users think twice when realise that tax authorities may consider a scheme to be avoidance

- Identification of users more effective with both client list and SRN approach

- UK considering new rules to target 'High-Risk Promoters' of avoidance schemes

Countries with mandatory disclosure regimes

Overview

- 5 member countries with MDRs as of 2011:
  - US, UK, Canada, Portugal, Ireland
- Israel is the only country to introduce a MDR since 2011
- Countries considering introducing mandatory disclosure rules:
  - **Korea** plan to introduce a MDR (proposed regime)
  - **Australia** is considering a regime to capture information on offshore tax arrangements similar to UK DOTAS

Objectives

- Policy objectives are broadly similar across all countries:

UK Portugal	To obtain early information about schemes To identify users To reduce the promotion and use of avoidance
US Canada Ireland	To get early information about schemes To identify users

- All countries seek early disclosure and identification of users
- UK and Portugal list deterrence explicitly

HM Revenue & Customs

Who Discloses?

Two types of disclosure obligation structure exist:

UK Portugal Ireland	Promoter or User
US Canada	Promoter and User

- Portugal and Ireland follow same model as the UK:
  - Promoter usually discloses, although the user must disclose in some circumstances
- In the US and Canada, disclosure obligation applies to both

What is disclosed?

Generic hallmarks or specific listed transactions are used to determine whether certain transactions are discloseable or not

UK	•3 Generic hallmarks to capture avoidance schemes •2 Specific hallmarks
Ireland	•3 Generic hallmarks – same as UK •Specific class or classes of tax advantage - losses, employment schemes, converting income
Canada	•Any transaction bearing at least 2 of the following 3 hallmarks: - Contingency fee, Confidential fee, Contractual protection

What is disclosed?

US	•Any transaction within one of the following five categories - confidentiality, contractual protection - listed transactions, loss transactions, transactions of interest
Portugal	•Arrangements involving: - low tax jurisdiction, tax exempt entity, use of losses, financial transactions causing conversion or recipient change - clause of waiving or limiting liability of promoter

- Broad similarities with mix of generic and specific hallmarks, but:
  - For Canada, at least 2 generic hallmarks are required
  - US regime requires particular schemes to be listed
- Generic hallmarks enable capture of ‘new’ and ‘innovative’ planning

Process - Promoters

UK	• **Within 5 days** of scheme available to clients
US	• **By the last day of the month following the end of the calendar quarter** when the advisor became a material advisor
Ireland	• **Within 5 days** of scheme available for implementation • User disclosures within 5 days from the date of the first transaction entered into
Portugal	• **Within 20 days following the end of the month** in which the scheme was made available to clients • User disclosures: before the end of the month following the month of implementation
Canada	• **By 30 June of the following calendar year** in which the transaction became a reportable transaction.

- Compared with the UK and Ireland, there is a time gap in disclosing the scheme to the tax authorities – reduces potential benefits from early warning

Process - Users

UK	• UK uses a Scheme Reference Number (SRN) system to enable the tax administration to identify scheme users. • Clients must report the SRN on a return affected by the use of the scheme
US	• Reportable transaction number given to material advisors to pass on to users, who include it in their tax return
Ireland	• Promoter submits list of all clients using scheme • Users **not** required to notify tax authority of use of scheme
Portugal	• Users **not** required to notify use of scheme
Canada	• Users required to notify use of the scheme

- Only US and UK use a scheme reference number as a unique identifier for different schemes.
- Not all countries require users to notify tax authority of use of scheme.
- UK requires promoters to send in a list of clients **and** users themselves record SRN on tax return

Enforcement

Penalty regimes vary in the structure and penalty amount

UK	• Penalties for non-disclosure up to £1 million • Daily penalties if user fails to report the use of a scheme on a return (from £100 per day to £1000 per day).
US	• (Material advisor) Penalty for non-disclosure from USD 50,000 to the greater of USD 200,000 or 50% (increased to 75% in certain case) of the gross income derived from providing advice. • (Taxpayer) Penalty for non-disclosure 75% of decrease in tax as a result of the transaction (ranging from USD 5,000 to 200,000)
Canada	• Penalty equal to the total of all fees payable to the promoter/advisor. • Each promoter or advisor jointly and severally liable with the taxpayer.

Enforcement

Ireland	• Initial penalty up to EUR 500 per day and • followed by daily penalties of EUR 500.
Portugal	• Penalties from EUR 5,000 to EUR 100,000 for promoter, and • from EUR 500 to EUR 80,000 for user.

- Daily penalties put emphasis on timely disclosure
- Penalties geared to fee income/tax are added incentive to comply
- Non-disclosure in Canada and Portugal can affect the efficacy of scheme.
- In UK, evidence is that most promoters are complying with disclosure rules. Few penalties for non-disclosure imposed to date.

How is information used ?

UK	• Taxpayer communications (e.g. 'Spotlights' articles warning against particular schemes) • Legislative change • Identify users of schemes • Behavioural change techniques – writing to potential users of schemes
US	• Informs IRS compliance effort • Legislative change • Matching information between material advisors and taxpayers.
Ireland	• Legislative change • Identify users of schemes
Portugal	• Published a list of 13 tax planning schemes considered as abusive
Canada	• Publication of taxpayer communication (e.g. Tax Alert)

Countries with mandatory disclosure regimes

Points to consider

- Scope of MDR
- Generic vs specific hallmarks for avoidance
- Promoter vs user disclosure and use of unique reference numbers for schemes
- Timing of disclosure
- Use of information from disclosure

HM Revenue
& Customs

Thank you

David Matthews

HM Revenue & Customs

+44 (0)3000 585988

david.matthews1@hmrc.gsi.gov.uk

Questions for delegates

1) What taxes should be covered? (what are the grounds for excluding a tax from MDR)
2) What are the transactions that should be targeted? (Should avoidance or tax benefit be a criteria? Can distinguish between new and old schemes?)
3) How have those that already have disclosure regimes focused on the transactions that concern them – what has worked well/ not so well ?
4) What do you think about the strengths and weaknesses of contrasting benchmarks? (Generic hallmarks VS listed transactions)
5) Should requirements be placed on both promoters and users? What has been the impact on promoters / promoter behaviour?
6) What has been the impact on the tax administrations resources?
7) What are the primary concerns that have been raised by taxpayers?