STEP response to HMRC’s consultation on the Extension of Offshore Time Limits
(published 19 February 2018)

About us

STEP is the worldwide professional association for those advising families across generations. We help people understand the issues families face in this area and promote best practice, professional integrity and education to our members.

Today we have over 20,000 members across 95 countries, with over 7,000 members in the UK. Our membership is drawn from a range of professions, including lawyers, accountants and other specialists. Our members help families plan for their futures: from drafting a will or advising family businesses, to helping international families and protecting vulnerable family members.

We take a leading role in explaining our members’ views and expertise to governments, tax authorities, regulators and the public. We work with governments and regulatory authorities to examine the likely impact of any proposed changes, providing technical advice and support and responding to consultations.

STEP welcomes the opportunity to provide comments on HMRC’s consultation document, which outlines the government’s intention to extend the timeframe within which HMRC can raise an assessment to at least 12 years in cases of non-deliberate offshore tax non-compliance.

Response

We agree with the overarching premise that it is right and fair that everyone pays all the tax they owe, including on offshore income, gains and chargeable transfers. Importantly, any fair tax system needs to strike an appropriate balance between collecting the right amount of tax due under the law and the right of taxpayers for certainty and finality in their affairs where they have acted openly and honestly with the tax authorities.

In our view, increasing the current assessment time limit from 4 years to 12 years in the case of non-careless and non-deliberate behaviour, and from 6 years in all other cases not involving deliberate behaviour, does not strike the appropriate balance. Furthermore, to do so would be at odds with many of the government’s stated intentions around ensuring that the UK remains globally competitive and open for business, and creates a potential conflict with the obligations placed on all organisations under other statutory obligations, including the General Data Protection Regulations (GDPR). GDPR will govern, amongst other things, how long organisations can retain information, with potentially severe penalties for any breach of these regulations. Tax legislation should comply with these regulations.

There have been numerous far-reaching changes to UK tax law in recent years, many of which create additional complexity for taxpayers and their advisers. As an example, the recent fundamental changes to the taxation of non-UK domiciliaries and overseas structures, in
particular the widening of anti-avoidance legislation in these areas, leads to greater risk of innocent non-compliance and, consequently, increased uncertainty for many taxpayers as they attempt to navigate the new landscape. The fact that pages of guidance and detailed FAQs have been prepared in response to recent changes highlights their complexity. This, aligned with the general domestic and geopolitical climate is causing many individuals to contemplate leaving the UK in favour of jurisdictions with simpler and more stable tax rules.

No reasonable tax system should expect individuals to live with the uncertainty of their tax affairs remaining open for 12 years after their last UK filing where they have acted honestly and openly but may nevertheless have unknowingly made an innocent error in relation to their UK affairs. It does not seem fair or appropriate for such taxpayers to live with this level of uncertainty for so long. In the case of formerly resident individuals, the practical issue of how HMRC plans to keep track of people once they have permanently left the UK so they can raise discovery assessments will clearly require full consideration.

Many non-UK residents have very recently had their affairs been brought into the UK tax net for the first time. The extension of capital gains tax to non-residents holding UK real property and the widening of UK inheritance tax (IHT) to any overseas person or entity with a direct or indirect interest in UK residential property [IHTA 1984 schedule A1] present a number of practical issues to consider. Many individuals and entities caught by this legislation will be non-UK residents who have never had a UK tax footprint previously and, unless they have UK advisers in relation to other UK matters, are likely to be unaware of this change in UK tax law given that they have no other UK connection. We can see an argument to give taxpayers and HMRC sufficient time to understand and agree the taxpayer’s obligations but a 12 year window feels excessive unless deliberate behaviour is involved – in which case the current time limits already extend to 20 years.

In a corporate context, extending the time limits for ordinary discovery assessment to 12 years presents a number of commercial implications that could affect the UK’s position as a competitive place to do business. Company sale and purchase agreements are not presently written with a 12 year assessment window in mind and the level of warranties and indemnities required going forward present genuine commercial concerns, including the increased cost of due diligence in a transaction context. There is also the potential exposure of shareholders in relation to transactions that have taken place within the requirement to correct window assuming this is the first period for which the new regime will take effect. This could deter potential inward investment in UK enterprise or international groups from expanding to the UK. The government has stated that the measure is not in itself expected to have any significant economic impacts. However, the cost of missed opportunities will be difficult if not impossible to quantify accurately.

The government’s intention is to ensure that the new legislation is “proportionate and targeted to account for certain information and gains notified to HMRC under automatic Exchange of Information Agreements”. It is not clear how this will be achieved or whether the same principles will apply to those jurisdictions that are either signatories to the Common Reporting Standard (“CRS”) or FATCA. Given that these automatic information exchange agreements will mean that more information is shared with HMRC and, as technology advances, more quickly, we query whether there is any need to extend the current assessment
windows. HMRC already have access to much more information and more sophisticated data analysis technology than ever before, and this is improving at a rapid pace. In any event, we suggest that the time limit extensions should not apply to offshore matters and transfers relating to those jurisdictions who are signatories to such agreements. As a minimum, there should be safeguards for taxpayers whose offshore matters are in jurisdictions that are subject to such agreements (see below in relation to question 6).

We are wary of any legislation which appears to discriminate one group over another. These rules focus on providing HMRC with increased powers of scrutiny for offshore matters even where there is no suggestion of careless behaviour, without acknowledging that the UK is a world economy populated by a diverse international base of individuals and entities who will have legitimate reasons for having overseas interests. To treat such persons with an increased level of scrutiny or suspicion is contrary to the spirit of promoting the UK as a place that welcomes international investment.

Finally, we note that the consultation refers to the assessment time limits being extended to “a minimum of 12 years to allow HMRC more time to establish the facts in offshore cases”. There is no invitation to comment on whether this time limit is appropriate. The presumption is that this time limit will take effect regardless. We would appreciate clarification of the term “a minimum of” and details of cases where a time limit greater than 12 years is envisaged under the proposals. Under current law, HMRC have up to 20 years to raise an assessment in the case of deliberate behaviour and whilst that time limit appears sufficient in those circumstances we do not see any other situation where a longer time limit is necessary.

We have responded to your specific questions below, where not otherwise referred to above. Where no specific response is included under a given heading below, we consider the point is addressed elsewhere.

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

Fundamentally, we believe that any tax system needs to be fair and straightforward. The more complex the regime, the greater the likelihood of mistakes happening. The rules relating to UK personal taxes are incredibly complex and change frequently and taxpayers can find themselves having made inadvertent mistakes, despite acting in an open and honest manner and, in many cases, instructing qualified professionals to assist them.

We consider that the introduction of the proposed measures does not strike the appropriate balance between taxpayer certainty and ensuring that the correct amount of tax is paid within a reasonable timeframe. Extending the assessment window from 4 to 12 years in cases where reasonable care (and where there is reasonable excuse) has been taken is not a measure that we support, particularly as HMRC have stated it is likely to have little economic impact. It is simply inappropriate for honest taxpayers to live with this uncertainty for so long. In addition, and for the same reasons, we do not support extending the window in relation to careless behaviour from 6 to 12 years.
either. The consultation document suggests that this measure will apply to income tax, capital gains tax and inheritance tax regardless of the consultation feedback. The current legislation on offshore matters applies only to those taxes. For this, and the reasons set out below, we do not advocate extending the proposals to cover other taxes.

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

   Notwithstanding our general concerns around the proposed measures, we do not believe it is in the best interests of UK business for them to extend to corporation taxes.

   In the context of company sales, the effect on warranties and indemnities could be significant. The potential for the company’s tax affairs to remain open for 12 years could deter potential purchasers, affect the price of the shares and, as minimum, increase due diligence fees. The impact on company sale and purchase agreements that have taken place within the new time limit window but outside the indemnity and warranty window could present significant problems for the current owner. In addition, this could be a deterrent to future sales, to the detriment to UK enterprise, which is contrary to the principle of the UK being open for business and ultimately bad for the UK economy.

   The practical aspects of company record keeping would need to be properly considered in line with existing laws and regulations. Many businesses would need to alter their internal policies and processes to accommodate a requirement to retain data for 12 years in all cases. Many businesses such as banks will not retain records for this long, particularly given the penal implications of the General Data Protection Regulations (GDPR) being introduced in May 2018 and which can impose a fine of 4% of global turnover for any business in breach of these rules. Such a breach would include retaining client records for longer than is deemed necessary. It is not clear whether the mere potential for an HMRC investigation is an appropriate justification for retaining documents for so long, particularly where the company’s directors and shareholders have no reason to believe any mistake has occurred in the company’s tax filings. We note the GDPR guidance published by the Association of Taxation Technicians and the Chartered Institute of Taxation (dated 26 March 2018) which sets out some parameters for how long information should be retained in particular circumstances. We would suggest that HMRC meet with the Information Commissioner to discuss this critical point further.

   Broadly, the increasing complexity of UK tax law and regulation, coupled with the gradual erosion of taxpayer and political certainty mean that many wealthy individuals and their businesses are either leaving or contemplating leaving the UK. These measures do nothing to allay these concerns and could well have the opposite effect.

3. **What are your views on the proposed definitions?**
4. **What are your views on the proposed scope of the rule?**

[already covered above]

5. **What are your views on the proposed commencement rule?**

To the extent that the rules will come into force regardless (as implied), we believe that there should be a transitional period before the new rules come into force to enable taxpayers and organisations to review their information retention policies and the new rules should not apply to any tax year covered by the Requirement to Correct (RTC) window. They should instead be limited to errors arising in the tax year the change comes into effect, or subsequent tax years (ie 2019/20 onwards).

In our view, the new rules should not apply until their impact has been discussed and agreed with the Information Commissioner so that businesses can be sure that they are fully compliant with, for example, statutory record requirements and GDPR.

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

HMRC have stated their acceptance that it can take some time to ascertain details of offshore transfers and that mistakes can happen which are not always picked up within the normal time limit window. It must follow that this can work both for and against the taxpayer. Specifically, taxpayers can inadvertently miss an opportunity to make claims that would otherwise reduce their UK tax liability.

The normal time limits for raising assessments in cases of innocent error currently align with the window for taxpayers to make claims (s42-43 TMA 1970; Sch1AB TMA 1970 etc). If a taxpayer misses the claim window then they have lost the ability to make the claim and this could clearly be to their detriment – for example a missed opportunity to claim the remittance basis or an overpayment of tax.

We believe that one window should only be extended where there is a corresponding extension to the other. As such, if the normal assessment time limit is to increase to 12 years, the opportunity for taxpayers to make claims and elections and rectify mistakes should also be extended to 12 years. As HMRC are primarily concerned with taxpayers paying the right amount of tax, rather than the most amount of tax, this would align with that goal. We note that the consultation is silent on this point and we believe that it is fundamental to striking the appropriate balance of fairness and compliance, which must remain at the heart of these proposals.

It may be that the statutory record keeping requirements for financial institutions should align with the new proposed self-assessment time limits but clearly the practical and economic impact of such measures will need to be carefully considered. Certain institutions may consider such provisions unduly onerous and thought would
need to be given to whether these measures may make the UK banking system uncompetitive in this context. Furthermore, given that many banking institutions will be in territories that are signatories to automatic exchange of information (AEOI) agreements, we would again assert that these measures are restricted to offshore assets and transfers relating to non-AEOI jurisdictions or, alternatively, only those in category 3 of the government’s Territory Categorisation for Offshore Penalties.

We would also comment on the obligation for HMRC to raise an assessment as soon as they can and to discourage HMRC from waiting until, say, years 7-12 to raise an assessment into a taxpayer’s affairs when they could have done so much sooner. In cases where additional tax is due following a discovery assessment, this would limit the amount of interest and penalties due. As an example, if an assessment is raised in year 8 but could in fact have been raised in year 7 but for the fact that HMRC did not get round to it, the interest due should be capped to what it would have been had the assessment been raised in year 7.

Broadly, taxpayers should not unduly suffer the financial consequences of HMRC delaying the issuing of an assessment in cases where they could quite reasonably have raised it much sooner.

7. **Do you have any comments on the assessment of equality or other impacts?**

[see our comments in section 6].

Submitted by STEP Technical Committee on 14 May 2018