

The Worldwide Disclosure Facility (Lecture P1300 – 15.35 minutes)

The Worldwide Disclosure Facilities has been in existence for several years, and HMRC is keen to encourage its use. The process is likely to be familiar to many advisers. However, there are numerous dangers in using the WDF, and advisers should use it with caution. This session will hopefully be of interest to first-time users of the WDF, as well as those who are more familiar with it.

A brief history of offshore disclosure facilities

The Worldwide Disclosure Facility (“WDF”) is the most recent of HMRC’s disclosure facilities connected to offshore issues. The sequence started with the Offshore Disclosure Facility (“ODF”) in 2007, followed by the New Disclosure Opportunity (“NDO”) in 2009. Although labelled as the final chance for taxpayers to come forward, the NDO was quickly followed (a month later) by the Liechtenstein Disclosure Facility (“LDF”), which offered very favourable terms for settlement. Disclosure facilities specific to the Crown dependencies (Jersey, Guernsey and the Isle of Man) followed in 2013. The offshore disclosure facilities closed on 31 December 2015. Less than a year later, on 5 September 2016, the WDF opened.

What is the Worldwide Disclosure Facility?

The WDF is an online process, accessed through HMRC’s Digital Disclosure Service. Although initially a short-term facility, the WDF is still with us today. The facility is open to taxpayers (covering individuals, companies, personal representatives, and executors) with an undeclared UK tax liability which is wholly or partly connected to an offshore issue. Advisers should note that, when using the WDF, they must ensure that any onshore issues are also disclosed. Where IHT liabilities are being disclosed, only those for the last 20 years can be notified through the WDF – any older liabilities must be disclosed separately.

The WDF is a different beast to previous disclosure facilities. Whereas earlier processes adopted a “carrot and stick” approach, the WDF does not have a “carrot” element. HMRC took the view that, given the significant volume of data they would be receiving following the introduction of the Common Reporting Standard (“CRS”), and the harsh penalty provisions under the Requirement to Correct regime, there wasn’t a need to offer favourable terms to taxpayers to come forward. As a consequence, there aren’t any special terms, or concessions, and, importantly, there isn’t immunity from prosecution.

The taxpayer is required to self-assess their behaviour, submit their quantified disclosure (including a calculation of tax, interest and penalties) within 90 days, and to pay the amount due within the same timescale. An agent can register on behalf of the client. HMRC issue an acknowledgement within 15 days of the submission of the disclosure, and “aim” to notify their decision within 90 days of issuing the acknowledgement.

What is good about the Worldwide Disclosure Facility?

Although the terms of the WDF are that the disclosure must be submitted within 90 days, there is the ability to seek a 90-day extension where the circumstances are “complex”.

Where there are complex issues, it might also be possible to obtain help from HMRC, although the assistance does not extend to that provided under the LDF where advisers had a single point of contact (“SPOC”).

There is a non-statutory clearance process that can be used once the taxpayer has registered for the WDF. Where the taxpayer is not going to be able to pay the disclosure liability (including any interest and penalty) within the required timeline, it is possible to agree payment terms with HMRC, although this must be done in advance of submission of the disclosure.

What is not so good about the Worldwide Disclosure Facility?

Although the WDF may be suitable for simple or straightforward cases, the process is fraught with danger for the unwary. Also, advisers may not know, with any certainty, that the case before them is simple or straightforward.

The key downside of the WDF is that there isn't immunity from prosecution. The HMRC guidelines are very clear on this point, and state that "HMRC reserves complete discretion to conduct a criminal investigation in any case". Advisers need to consider whether the circumstances of the case are such that the Contractual Disclosure Facility should be used, where, among other advantages, immunity is available for a full disclosure.

There is the risk of investigation by HMRC (whether under their civil or criminal processes), including where an inaccurate disclosure is made. Another key downside is the need for the taxpayer's behaviour to be self-assessed, with the number of years to be included in the disclosure following on from this assessment. I have seen numerous examples since the WDF's introduction where an adviser has submitted a disclosure on the basis of reasonable care, or careless behaviour, only for HMRC to investigate and pursue the case on the basis of deliberate behaviour. This can arise in numerous ways, including where the adviser has not challenged the client robustly enough, or has failed to discuss the implications of submitting an incorrect disclosure. This can arise because of the very short time allowed for submitting a disclosure under the WDF. Even with an extension, 180 days is not always going to provide sufficient time to thoroughly investigate a problem that may cover a 20-year period.

The disclosure can get complicated where there are outstanding tax returns. Where those returns are for 2017/18 or later, they must be completed and submitted to HMRC, and are excluded from the WDF submission. As mentioned above, and unlike previous facilities, the WDF does not provide any incentives to use the process – all relevant years must be included, HMRC does not forego any tax, and the full penalty must be applied, based on current legislation.

A higher penalty will be charged, in various circumstances under the WDF, including where:

- There is an existing enquiry;
- The disclosure is connected to a previous inaccurate disclosure or settlement following an investigation;
- The existing penalty legislation is not followed.

One of the requirements of the WDF is that the taxpayer must give "any extra information" requested by HMRC, or face:

- Higher penalties;
- A civil or criminal investigation;
- Publication of details.

The above sanctions may also apply where an inaccurate disclosure has been made. There is a distinct lack of safeguards for taxpayers under the WDF. If HMRC requested information in the context of a formal enquiry, under s9A TMA 1970, for example, there is a reasonableness requirement.

Dangers of using the Worldwide Disclosure Facility

There are numerous pitfalls when using the WDF, as noted above, with, potentially, serious consequences for the client. Advisers must submit the disclosure within a short period, that will prove challenging even in the simplest of cases. The ability to correctly determine the category of behaviour requires an objective consideration of the circumstances, and available documentation. Getting this wrong will have significant implications for the client, and advisers may want to seek a second opinion, particularly in borderline cases. It is easy to overlook the provisions of the Requirement to Correct regime, but those rules will need to be considered.

The main danger, in my opinion, when using the WDF, is the risk of prosecution, including where there has been an incorrect determination of the client's behaviour, previous HMRC investigations, or false statements have been provided to HMRC. The risk of prosecution can, however, be mitigated, as noted below.

Considerations before using the Worldwide Disclosure Facility

Advisers should consider, when faced with an unprompted offshore-related disclosure or a prompted one, following, perhaps, a HMRC nudge letter, whether the WDF is the best option for the client. The WDF is suitable for simple or straightforward cases, but the adviser needs to establish whether the case fits description before proceeding down the WDF route. Otherwise, the adviser may want to consider approaching HMRC outside of the WDF process.

Where deliberate behaviour is determined, the adviser should consider whether the Contractual Disclosure Facility ("CDF") (HMRC's civil investigation of fraud process) is a better option, particularly where there has been a material under-declaration by the client, and/or there are aggravating factors. The key advantage of the CDF is that immunity from prosecution for tax offences is obtained where the client makes a full disclosure. It is recommended that specialist advice is taken when considering this option.

Contributed by Phil Berwick, Berwick Tax