

10 September 2009

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Permanent Secretary for Tax and Commissioner of HMRC
HMRC
100 Parliament Street
London
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Our Ref: BTG-Tax/ LDF/AMcK

Your Ref:

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Dear Sir

Liechtenstein Disclosure Facility (LDF)

The recent announcement of the LDF alongside HMRC's New Disclosure Opportunity (NDO) produced a significant amount of technical and guidance material on the HMRC web site. The details of the terms and conditions for each disclosure facility required careful consideration by tax advisers to ensure that those individuals requiring advice in respect of their particular circumstances were able to act within the law and guidelines. Extensive material was supplied by HMRC on its web site, including:

- Joint Declaration by the Government of the Principality of Liechtenstein and Her Majesty's Revenue and Customs Concerning the Memorandum of Understanding Relating to Cooperation in Tax Matters signed on 11 August 2009.
- Memorandum of Understanding (MOU) Between The Government of the Principality of Liechtenstein ("Government of Liechtenstein") and Her Majesty's Revenue and Customs ("HMRC") of the United Kingdom and Northern Ireland relating to Cooperation in Tax Matters.
- LDF Frequently Asked Questions (as updated on 10 September 2009).
- LDF Frequently Asked Questions for Tax Agents and advisers (as updated on 10 September 2009).

Upon analysis the LDF material highlights a number of areas of ambiguity and concern. We have detailed these areas below and request that HMRC provide clarity on these points to allow the correct advice to be given to those coming to us for advice in respect of potential disclosures they wish to make.

1. Human Rights - NDO and the LDF

There are significant benefits afforded to those persons eligible to participate in the LDF when compared to the NDO. LDF requires that unpaid duties are only disclosed for periods from April 1999, whilst the NDO requires 20 years disclosure for all duties except IHT which requires a longer period. The LDF offers a 5 year period up to 31 March 2015 within which to make the disclosure whilst the NDO has a very narrow and limited disclosure window ending on 12 March 2009. There are terms offering a bespoke service to LDF participants enabling them to initially discuss their situation with HMRC with anonymity, get a named Tax Officer to assist them with their disclosure, discuss and get agreement to residency and domicile issues via that Officer and explore how any resulting tax liability can be paid. None of these features are available under the NDO. In terms of

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the disclosure made being accepted, the NDO has no definitive date stated by which HMRC will accept the disclosure or enquire into it. The LDF has defined dates incumbent upon HMRC to achieve closure in respect of the disclosure, embedded into the MOU. On any reading of these differences it is clear that the LDF participants will obtain differential and beneficial treatment when compared to those participating under the NDO. That benefit afforded to LDF participants is both financial and definitive in terms of the closure of the matter. The overall analysis of these differences suggests that HMRC are in breach of the Human Rights Act – specifically that no one should be discriminated against and that all people are treated equally (Article 14 – Discrimination).

BTG Tax request that HMRC confirm that they have undertaken an analysis on the Human Rights impact of the NDO and LDF differences and provide full details to support that analysis.

2. Liability to UK tax in respect of Liechtenstein investments

At question 12 of the LDF Frequently Asked Questions for Tax Agents and advisers it states that the LDF will apply to a tax adviser's client if the client :

'holds investments in Liechtenstein and has liability to UK tax in respect of those investments'.

Detailed reading of the MOU states that 'eligible persons' can participate in the LDF. The MOU defines an eligible person at Schedule 1 (e) as a 'relevant person' or a person otherwise considered to have any liability to UK tax in respect of 'relevant property' and that they are prepared to fulfil their obligations under the LDF.

A 'relevant person' is defined in Schedule 1 (o) as:

i) In the case of a natural person, a person who has a beneficial interest in relevant property and

(1) who, on 1 August 2009 or at any time thereafter, the financial intermediary knows has had a residential address in the UK which the financial intermediary is or was accustomed to treat as his or her principal address; or

(2) who, on 1 August 2009 or at any time thereafter, the financial intermediary knows has been resident for tax purposes in the UK; or

(3) for whom, on 1 August 2009 or at any time thereafter, a UK address has been given in a form identifying that person as the "beneficial owner" provided to the financial intermediary under Liechtenstein anti-money laundering legislation.

ii) In the case of a legal person, a person which has a beneficial interest in relevant property and

(1) has its place of incorporation in the UK, or

(2) which, on 1 August 2009 or at any time thereafter, the financial intermediary knows has been a resident of the UK for UK tax purposes.

'Relevant property' is defined at Schedule 1 (p) and includes bank or financial (portfolio) accounts in Liechtenstein and various financial structures founded, settled, incorporated, administered, or managed in Liechtenstein. It makes no reference to the 'relevant property' resulting in a UK tax liability.

In summary then the MOU does not require a tax liability to exist in respect of the Liechtenstein relevant property only that the 'relevant person' has a beneficial interest in 'relevant property'.

BTG Tax request HMRC to explain how they have arrived at the comments made in the Frequently Asked Questions document as referred to, with appropriate references to support those comments from the MOU Schedules. Additionally written confirmation is sought that there does in fact not have to be any tax liability arising in the UK current or past in respect of the Liechtenstein relevant property to allow participation in the LDF.

3. Eligibility to Participate in the LDF

Schedule 7 of the MOU summarises the details of the disclosure facility. At paragraph 3 it states that a person will not be eligible if they have received a notice from a financial intermediary in Liechtenstein (as detailed in paragraph 1 of Schedule 3) and that person is already 'under investigation' by HMRC with respect to the relevant property. 'Under investigation' is defined at Schedule 1 (w) as:

'means where there is a suspicion of serious tax fraud and the person has been formally notified by HMRC that an investigation has commenced..'

HMRC provide notification of enquiries involving serious tax fraud by way of *Code of Practice 9 - Civil Investigation into cases of serious fraud*. This indicates that a person subject to any other type of HMRC enquiry other than a COP 9 enquiry, no matter how long it has progressed, assuming they meet the requirements as stated can proceed to participate in the LDF.

BTG Tax request that HMRC confirm whether or not the analysis detailed above is correct. If HMRC believe the analysis is incorrect full details of the relevant section of the MOU supporting their position are requested.

An additional point arises in respect of Schedule 7 paragraph 3. The wording of that exclusion appears to allow any persons subject to **any** type of HMRC enquiry to participate in the LDF, including those under a COP 9 enquiry. They are not excluded because they will not have received a notice from a Financial Intermediary and will not do so until the relevant Liechtenstein legislation is in place. This appears to be the case because Schedule 7 paragraph 3 requires both of the subsections, (a) and (b), to be met by virtue of the 'and' following sub-paragraph (a).

BTG Tax request HMRC to confirm that analysis detailed above is correct. If HMRC believe the analysis is incorrect full details of the relevant section of the MOU supporting their position are requested.

4. Acquiring 'relevant property' after 1 September 2009

Analysis of the MOU raises questions about the eligibility of persons to participate in the LDF particularly where those individuals acquire 'relevant property' after 1 September 2009 and have other distinct features including other offshore assets which require disclosure to HMRC or other solely UK based tax disclosures.

Detailed below are several examples upon which BTG Tax has commented and for which we request HMRC's confirmation or disagreement with our stated opinion. Any disagreement should be explained with full reference to the relevant sections of the MOU.

Example 1

A person has offshore bank accounts opened outside of the UK and Liechtenstein, the tax liability arising in respect of which he has not disclosed to HMRC. After 1 September 2009 he acquires relevant property in Liechtenstein. As a consequence he is an eligible person and can participate in the LDF with the disclosure for all liabilities covering the period from April 1999 onwards. There will be no obligation to disclose under NDO nor will there be any liabilities arising for periods prior to April 1999.

Example 2

A person has offshore bank accounts opened through a UK branch or agency, the tax liability arising in respect of which he has not disclosed to HMRC and that liability extends beyond 10 years. He acquires relevant property in Liechtenstein, with a nominal amount of funds and closes the aforementioned offshore accounts. The funds arising from the closure of the offshore accounts is transferred either into Liechtenstein, or the UK or other offshore accounts which are opened outside the UK. As a consequence he is an eligible person, who does not hold any accounts outside the UK or Liechtenstein opened through a UK branch or agency of that bank. He is not excluded by Schedule 7 (4) (d) from the benefits of the restricted disclosure period offered by LDF as compared to NDO. Schedule 7 (4) (d) states he must currently have the offshore accounts for a longer disclosure period to apply, whereas by closure of those accounts he does not now have them. See Schedule 7 (4) (d) text below with 'has' in bold, defining that the account(s) must still be currently held to be excluded from the April 1999 disclosure period so that a longer period applies.

*'a person who participates in the disclosure facility and **has** a bank account, including a financial (portfolio) account, outside the UK or Liechtenstein which is in his name and was opened through a UK branch or agency of that bank, will not, in relation to that account, be eligible for the shorter limitation period, the fixed penalty and the composite rate option referred to in paragraphs 5 and 6 of this Schedule'.*

*On the basis of the facts above and the details within the MOU, the person's disclosure qualifies under LDF for **all** liabilities and will be restricted to the years from April 1999 onwards.*

HMRC's Frequently asked Questions (as updated on 10 September 2009) at questions 20 and 21 however, indicates that the disclosures in relation to the non Liechtenstein offshore accounts opened through a UK branch or agency even if they are closed as described above, will not qualify for the restricted 10 year disclosure period within LDF. Reference is made to the 'has a bank account' applying as at the date of the signing of the MOU. This is not clear in the MOU and would appear to be an interpretation by HMRC which suits their position. Indeed elsewhere in the MOU, (eg. Schedule 7 (4)(a)) specific reference is made to 'as of the date of signing of this MOU' - but not in Schedule 7 (4)(d).

HMRC are invited to clarify their statement in the Frequently asked Questions document and provide details of what material in the MOU or otherwise in the public domain supports their comments.

HMRC are also invited to define what they mean by UK branch or Agency as included in Schedule 7 (4) (d).

Example 3

A person has undisclosed tax liabilities arising solely in respect of UK based assets, income and gains – he has no offshore assets. Those disclosures go back at least 20 years. He acquires a relevant property in Liechtenstein after 1 September 2009 and is eligible to participate in the LDF. The disclosure will be restricted to the liabilities arising for all years from April 1999 onwards.

5. Legal requirements of the MOU

The MOU requires the Government of Liechtenstein to introduce legislation to carry into effect the LDF. This legislation is not in force currently and could be amended or indeed fail to be implemented as described. This would suggest that persons wishing to make an LDF should await the legislative support.

BTG Tax ask HMRC to confirm what will happen if the legislation is not introduced.

These matters are very important and are being raised in discussions that we are having with prospective clients and third party intermediaries. HMRC's position on a number of significant issues in respect of the meaning and application of the MOU appears to be evolving as concerns in the wording of the MOU are pointed out. This is not acceptable given the serious nature of the matters involved and the imminent deadlines within the NDO.

Additionally, such lack of clarity does not allow consistency in advice to potential disclosers. The answer to question 23 of the Frequently asked Questions appears to highlight even more ambiguity as it states that the terms of the MOU can be varied by agreement between the parties and that a Second Joint Declaration is upcoming. Can HMRC please confirm the date upon which that second declaration is expected to be published.

Finally we would appreciate a response in respect of all the matters raised in this letter as soon as possible so that we can inform our clients of the appropriate method of disclosure.

If you wish to discuss any of the matters raised in this letter please contact Andrew McKenna on 0161 837 1886 or 07841 494 471. Alternatively if you feel that a meeting would be the best way to discuss the matters please provide details of any proposed times and dates for such a meeting and we will confirm when we are available by return post.

Yours faithfully

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Director
BTG Tax

cc. Liechtenstein Desk
Mr A Cole