P.2019/131

THE STATES OF DELIBERATION
of the
ISLAND OF GUERNSEY

POLICY & RESOURCES COMMITTEE

INTERNATIONAL TAX MEASURES – MISCELLANEOUS AMENDMENTS TO THE INCOME TAX LEGISLATION

The States are asked to decide:-

Whether, after consideration of the Policy Letter entitled "International Tax Measures – Miscellaneous Amendments to the Income Tax Legislation" dated 8th November, 2019, they are of the opinion:-

That the Income Tax (Guernsey) Law, 1975, as amended ("the Law"), and regulations thereunder, should be revised to:

(a) Provide the Revenue Service with the power to undertake onsite visits in respect of business premises from which a person is or may be operating, for the purposes of reviewing compliance with the Common Reporting Standard ("CRS") and any other matters relating to income tax or international tax measures;

(b) Place a requirement for all financial institutions, operating in Guernsey, to register with the Revenue Service and, when doing so, detailing their classification for the purposes of CRS and the Foreign Account Tax Compliance Act ("FATCA");

(c) Enable the Revenue Service to issue a notice to a financial institution to complete corrective remedial actions, related to CRS and/or FATCA reporting and in the case of significant non-compliance to be required at its own cost to appoint a suitably qualified independent person for the purposes of determining the full extent of the non-compliance, overseeing the repair, validating that the corrective measures have moved the financial institution into a compliant position, and making a relevant disclosure to the Revenue Service confirming this position;

(d) Require financial institutions to report to the Revenue Service all account holders where they have been unable to obtain valid self-certification for the purposes of CRS and/or FATCA due diligence procedures. To then enable the Revenue Service

to serve a notice to the financial institution to require them to freeze the account, until such time as the accountholder provides valid self-certification;

(e) Amend section 193 of the Law (as modified in the relevant CRS and FATCA Regulations) to make it clear these penalties are applied only in respect of the late filing of reports;

(f) Amend the provisions contained within section 193(1) and section 200 of the Law, to make it clear that where a person has failed to deliver a return, other than a return of income, by the filing deadline, the Revenue Service may automatically impose a penalty, without the requirement to issue a notice stating the grounds of their belief and providing the person with a reasonable opportunity to state their case (without prejudice to the person's right of appeal);

(g) Enable the Revenue Service to impose increased levels of daily penalties, in the exceptional cases where a person continues for more than 30 days after the imposition of the original penalty not to meet any of its reporting or filing obligations under the Law;

(h) Enable the Revenue Service to impose specific penalties for the submission of CRS/FATCA returns which are incorrect or incomplete in a material particular where the maximum penalty to be imposed is based on a percentage of the balance or value of accounts, that were not reported;

(i) Amend section 190 of the Law so that where a company fails to deliver a return of income within the filing deadline, the current maximum penalty of £50 where the company, for example, has no income or profits in the period for which the return is required will no longer apply;

(j) make necessary amendments to the Income Tax (Guernsey) Law, 1975, in order to be able to implement the provisions of the Assistance in Collection Article contained in the Double Taxation Agreement between Guernsey and the United Kingdom.

That the Policy & Resources Committee be instructed to:

(k) make Regulations, to be laid before the States, in accordance with section 75CC of the Law, to implement the Mandatory Disclosure Rules relating to CRS Avoidance Arrangements and Opaque Offshore Structures, as published by the OECD; and

That -

(l) the MDR shall, in accordance with section 75CC(1C) of the Income Tax (Guernsey) Law, 1975, be specified for the purposes of that Law as an international tax measure (the provisions of which may accordingly be implemented by regulations of the Policy & Resources Committee under section 75CC(1A) of that Law).

To direct the preparation of such legislation as may be necessary to give effect to the above proposals.

THE STATES OF DELIBERATION
of the
ISLAND OF GUERNSEY

POLICY & RESOURCES COMMITTEE

INTERNATIONAL TAX MEASURES – MISCELLANEOUS AMENDMENTS TO THE INCOME TAX LEGISLATION

The Presiding Officer
States of Guernsey
Royal Court House
St Peter Port

8th November, 2019

Dear Sir

1. Executive Summary

This policy letter proposes a number of amendments to income tax legislation in order to meet the international tax commitments that Guernsey has made, as set out below:

Common Reporting Standard – Financial Institution Compliance Framework

1.1. When Guernsey committed to implement (what was then) the new international standard in respect of tax transparency (the Standard for Automatic Exchange of Financial Account Information in Tax Matters, which is referred to as "the Common Reporting Standard" or "CRS") in 2014 it included a requirement that:

> "A jurisdiction must have rules and administrative procedures in place to ensure effective implementation of, and compliance with, the reporting and due diligence procedures …".

1.2. The Revenue Service (being the Service Area that deals with the administration and exchange of information under the CRS) has implemented the framework in a phased approach. Initially, since 2016, this has focussed on providing education and a robust computer system which enabled financial institutions to submit reports of the required financial data in a format that complied with the specific template requirements, which in turn enabled the Revenue Service to then monitor and carry out relevant compliance activities in respect of those financial institutions that failed to file the required reports by the filing deadline.

1.3. Now that the Revenue Service has completed the third annual cycle of receiving and transmitting data, it is necessary to transition to the next phase of the implementation of the CRS. This involves a far more focussed approach on ensuring Guernsey financial institutions are meeting their CRS obligations. In preparing for this phase it has been recognised that further enhancements to the income tax legislation are required in order to ensure that Guernsey has a robust, effective, compliance framework that balances the need to ensure the CRS is being implemented correctly, whilst seeking to limit, insofar as possible, the extent of the additional compliance burden on Guernsey financial institutions.

1.4. The OECD, Global Forum on Transparency and Exchange of Information for Tax Purposes ("the Global Forum") agreed to put in place a framework to monitor and review the implementation of the CRS by all committed jurisdictions (a peer review process) which, given the size and complexity of the CRS, has been split into three parts, those being:

- Legal framework;
- Effectiveness in practice; and
- Data safeguarding and confidentiality (which extends beyond the CRS and affects other tax transparency measures, also implemented by Guernsey, such as Country by Country Reporting ("CbCR")).

1.5. All of the jurisdictions that committed to implementing the CRS for reporting commencing in 2017 or 2018 have already been subject to the initial peer review process in respect of the legal framework. The peer review of Guernsey's legal framework resulted in only one recommendation to correct a perceived deficiency in the legislation (this is now in the process of being amended) and a number of notes which will be considered in the next stage of the peer review process, which will look at the effectiveness of the CRS regime, as it works in Guernsey in practice.

1.6. A significant aspect of this next stage of the peer review process will focus on how the Revenue Service will ensure Guernsey Financial Institutions are complying with their legal obligations, including that all relevant financial institutions that have a reporting requirement are registered with the Revenue Service and are making reports and that those reports are complete and accurate. Ultimately the peer review process is intended to result in each jurisdiction receiving a rating of its level of compliance with CRS.

1.7. This Policy Letter recommends a number of amendments to the income tax legislation which are intended to ensure the Revenue Service has the relevant ability to conduct compliance reviews and take appropriate action in any cases of non-compliance.

Mandatory Disclosure Rules on CRS Avoidance Arrangements and Opaque Offshore Structures

1.8. Guernsey made a political commitment, in response to the European Union ("EU") Code of Conduct Group's investigation of tax policies of third countries to the EU, as detailed in the 2019 Budget Report. One aspect of that political commitment was to introduce Mandatory Disclosure Rules ("MDR") and the 2019 Budget Report detailed the position as follows:

> "5.37 It is also proposed that a commitment is given to introduce legislation for mandatory disclosure rules by 31 December 2019 (the timescale that countries within the EU are working towards) aligned to the OECD work on mandatory disclosure rules for CRS Avoidance Arrangement[s] and Opaque Offshore Structures …".

1.9. The MDR framework is designed to require those persons involved in either the promotion, design, marketing, implementation or management of a relevant arrangement or structure in Guernsey, to be legally obligated to report the existence of the arrangement or structure and the users of it to the Revenue Service. The Revenue Service will then exchange the relevant information with those jurisdictions in which the users are resident, subject to the relevant international exchange relationships being in place.

1.10. The MDR is, therefore, a further automatic exchange of information framework (i.e. similar to the CRS) which Guernsey will enter into under the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (or an appropriate Tax Information Exchange Agreement or Double Taxation Agreement, as the case may be) all such agreements having been specified as "approved international agreements" in accordance with section 75C(1) of the Income Tax (Guernsey) Law, 1975, as amended (" the Income Tax Law").

1.11. This Policy Letter recommends that the States of Deliberation declare that the MDR is an international tax measure, in accordance with section 75CC(1C) of the Income Tax Law and instruct the Policy & Resources Committee to make such Regulations that are necessary to implement the provisions of the MDR in Guernsey.

Assistance in Collection

1.12. Assistance in Collection is a provision that can be included in international tax agreements which, based on the OECD Model text, provides for the parties to the agreements to assist one another in collecting delinquent tax debts.

1.13. The only international tax agreement Guernsey has which includes an Assistance in Collection Article is the Double Taxation Agreement between Guernsey and the United Kingdom ("the Guernsey/UK DTA"), that Agreement having been recognised in accordance with section 172(1) of the Income Tax Law on the 12 December 2018

(Billet d'État XXVII of 2018, Article 23) and specified as an approved international agreement for the purposes of that Law by Ordinance of the States.

1.14. The Policy Letter dated 2nd October 2018 (included in Billet d'État XXVII, Article 23) explained that the Assistance in Collection Article would only have effect from the date specified in an exchange of letters (giving both parties the opportunity to introduce any necessary legislation). At that time, discussions between officers of the Revenue Service and HM Revenue and Customs ("HMRC") were ongoing, in order to determine the mode of application of the Article. These discussions have progressed to such a stage that it is now possible to provide further details.

1.15. This Policy Letter recommends amendments be made to the Income Tax Law, in order to be able to implement the provisions of the Assistance in Collection Article contained in the Double Taxation Agreement between Guernsey and the United Kingdom.

2. Background

Common Reporting Standard (and Foreign Account Tax Compliance Act) – Financial Institution Compliance Framework

History of the Common Reporting Standard

2.1. In 2014, the OECD together with the G20 countries, EU and other stakeholders concluded the development of the CRS. This was in response to the G20 call for the facilitation of cross-border tax transparency on financial accounts held abroad. Introduction of the CRS has progressed to the extent that over 100 jurisdictions have committed to its implementation.

2.2. Guernsey had issued a joint statement with 36 other countries in 2013, supporting the work on developing the CRS and then a further statement in 2014 with a further 44 countries committing to the early adoption of the CRS.

2.3. In 2015, the Income Tax (Approved International Agreements) (Implementation) (Common Reporting Standard) Regulations, 2015 ("the CRS Regulations") were introduced, the CRS Regulations provided the framework by which the CRS was implemented in Guernsey, with the first reporting from Guernsey financial institutions taking place in June 2017 (providing 2016 data).

2.4. The Revenue Service has recently completed the third successful year of exchanging financial account information, with the expanding list of committed jurisdictions, under the CRS. Globally the CRS is now becoming embedded and committed jurisdictions are transitioning from the implementation phase (covering awareness and education) to carrying out compliance reviews in respect of the completeness and the accuracy of the reports received from their respective financial institutions.

2.5. This is a necessary function of the Revenue Service, because, when Guernsey committed to implementing the Standard, included within Section IX of the CRS is a requirement to ensure its "Effective Implementation" which includes:

"A jurisdiction must have rules and administrative procedures in place to ensure effective implementation of, and compliance with, the reporting and due diligence procedures set out above …".

2.6. Subsequently, in late 2018, the Global Forum endorsed the framework for the full Automatic Exchange of Information ("AEOI") Reviews Terms of Reference. This is the framework upon which all of the jurisdictions, that have committed to implement the CRS, will be subject to a periodic comprehensive peer review.

2.7. The Terms of Reference of the peer review process are set out in three Core Requirements of the CRS, which are:

- Core Requirement 1 – Jurisdictions should ensure all Reporting Financial Institutions apply due diligence procedures which are in accordance with the CRS to review Financial Accounts they maintain, and collect and report the information required by the CRS;

- Core Requirement 2 – Jurisdictions should exchange information with all Interested Appropriate Partners in accordance with the CRS, in a timely manner, ensuring it is sorted, prepared, validated and transmitted in accordance with the CRS; and

- Core Requirement 3 – Jurisdictions should keep the information exchanged confidential and properly safeguarded, and use it in accordance with the exchange agreement under which it was exchanged.

2.8. The overarching Core Requirements are then supplemented by Sub-Requirements, which set out the more specific detailed requirements that jurisdictions are expected to adopt in their implementation of the CRS. Both the Core Requirements and Sub-Requirements are separated to enable the assessment process to determine whether a jurisdiction has:

- The legal framework in place for each element; and

- The practical framework implemented by the jurisdiction ensures the effectiveness of the regime.

2.9. The Global Forum's methodology of the full comprehensive AEOI peer review process is still being finalised. However, all committed jurisdictions have undergone the preliminary assessment of their legislation that they have introduced to implement the CRS. The next aspect of the review will focus on the practical framework, which includes a requirement for all committed jurisdictions to

complete a detailed questionnaire by 31 March 2020 explaining the compliance strategy and compliance activities they have put in place to identify, broadly, whether all financial institutions:

- Have correctly assessed whether or not they have a reporting requirement under the CRS Regulations;

- Having established that they do have a reporting obligation, are then reporting all relevant financial accounts; and

- Have reported accurately and completely, including correctly identifying account holders (and Controlling Persons[1] of accounts held by Entities) based on the required client due diligence procedures.

2.10. At the conclusion of the AEOI peer review process each jurisdiction will receive a determination (a rating) of the extent to which it has met the commitment it entered into when adopting the CRS. This is similar to the process that jurisdictions are subject to under other OECD led international standards, such as the longstanding exchange of information on request (where, in the last round of peer reviews, Guernsey achieved a rating of Compliant, the highest rating).

2.11. A negative rating in the AEOI peer review process would result in reputational damage to Guernsey, given the long track record as a transparent and cooperative jurisdiction. Furthermore, Criterion 1.2 of the EU Code of Conduct Group on Business Taxation's ongoing monitoring of jurisdictions meeting tax good governance principles includes:

"…Membership of the Global Forum on transparency and exchange of information for tax purposes and satisfactory rating …".

It would, therefore, be reasonable to conclude that a negative rating from the Global Forum, in respect of the AEOI peer review, would trigger the EU Code of Conduct to review whether Guernsey continued to meet Criterion 1.2 and such a failure would ultimately result in Guernsey being listed as non-cooperative, which would undermine the work undertaken throughout 2018 and 2019 in introducing economic substance requirements for all legal persons carrying on geographically mobile activities.

<u>Compliance Strategy and methodology</u>

2.12. In light of this, the Revenue Service has been developing its compliance strategy in respect of Guernsey financial institutions' compliance with the CRS ("the AEOI FI Compliance Strategy") that seeks to ensure Guernsey can demonstrate that the Revenue Service's compliance review activities (in combination with effective

[1] Terms which are capitalised in the Policy Letter and not defined are terms used and defined in the CRS

working with other government agencies and the Guernsey Financial Services Commission) are sufficiently robust to meet the CRS. This strategy also covers compliance with the Foreign Account Tax Compliance Act ("FATCA") upon which the CRS was based, and which Guernsey committed to, with the United States of America, in 2013.

2.13. The AEOI FI Compliance Strategy is designed using a risk based approach and the Revenue Service Information Gateway Online Reporter ("IGOR") software that is used for CRS reporting is being developed to further enhance the Revenue Service's ability to view and analyse the CRS reports in order to identify and profile potential risks.

2.14. It is recognised that a large part of ensuring a financial institution is meeting their CRS obligations depends on the accuracy and completeness of the policies and procedures the financial institution has adopted and whether they have consistently applied those policies and procedures. Whilst the Revenue Service already has a broad suite of information gathering powers, contained in Part VIA of the Income Tax Law, these powers lend themselves to the traditional methods that the Revenue Service has used when making enquiries, namely, calling for records and information to be produced, then if necessary requiring a customer to provide further explanation in relation to the records produced.

2.15. Whilst this approach will continue to be utilised and will continue to be effective, the Revenue Service is conscious that in order to progress the Revenue Service compliance reviews as efficiently as possible, with financial institutions, it would be beneficial if duly authorised Revenue Service officers were able to conduct part of the compliance review at the business premises of the financial institution ("an onsite visit"). In doing so, this will reduce the need for financial institutions to have to arrange for copies of their underlying CRS records to be delivered to the Revenue Service and then having to deal with follow up enquiries. Instead, it is envisaged that Revenue Service officers will meet with the representatives of the financial institution, at the relevant business premises, and would be able to review the relevant records in situ and discuss any immediately identified concerns.

2.16. The ability to carry out such onsite visits also formed part of the compliance strategy in respect of the more recently introduced economic substance requirements (the relevant provisions were included in Regulation 17 of the Income Tax (Substance Requirements) (Implementation) Regulations, 2018). The proposal is to introduce similar provisions into the Income Tax Law legislation for CRS and FATCA, and have all of the same safeguards and restrictions contained within it.

2.17. Those safeguards and restrictions will include that the Revenue Service will only be entitled to enter business premises for the purposes of inspecting business documents. It will also be necessary for the occupier of the premises to provide consent, or for the Revenue Service to have provided 7 days written notice or that the entry and inspection has been approved by the Bailiff.

2.18. Whilst initially the main purpose of the onsite visits will be focussed on addressing CRS and FATCA compliance, as the Revenue Service continues to modernise the way in which it ensures compliance with the filing of domestic income tax returns, the Revenue Service anticipates that it would also be permitted to use the new provision to enter business premises and inspect documents (subject to similar safeguards and restrictions) in the performance of all of its functions under the Income Tax Law.

2.19. Another key element of the AEOI FI Compliance Strategy is determining that the Revenue Service have a level of assurance that all financial institutions in Guernsey have considered their obligations under CRS and FATCA and, where necessary, are carrying out the relevant reporting. At present the legislative requirements only require a financial institution to register with the Revenue Service when they have determined that they have a reporting requirement (and are classified as a Reporting Financial Institution).

2.20. This existing registration process, via IGOR, has been extremely useful in enabling the Revenue Service to carry out relevant enforcement action in respect of the minority of financial institutions that have failed to submit their relevant reports by the filing deadline. However, the existing process does not give the Revenue Service the visibility of those financial institutions that have determined (possibly erroneously) that they do not have a reporting requirement, so further enhancements are needed.

2.21. The benefits of introducing an additional registration requirement is twofold; firstly it will enable the Revenue Service to factor the registration details into the risk parameters, using other sources where necessary. This will help the Revenue Service refine its existing risk activities to better focus resources on financial institutions that appear to exist in Guernsey but have not registered ("ghost FIs") and/or potential cases of mis-classification. Secondly, at present, the Revenue Service are unsighted as to whether a financial institution has not registered to report for FATCA or CRS purposes, either because it has classified itself as a Non-Reporting Financial Institution, or it has simply failed to comply with its legal obligations (and so is potentially a ghost-FI). At present where the Revenue Service identifies an entity that appears as if it is a financial institution that is not registered on IGOR, it is necessary to make enquiries to that financial institution to determine its status, whereas, with the introduction of the additional registration process the Revenue Service will be able to refine this element of the compliance activities to only make enquiries where a classification on the register is flagged as a risk or there remains a risk of a ghost-FI (i.e. there is an indication that there is a financial institution in Guernsey that has failed to comply with the additional registration process). This refined approach will, therefore, reduce the number of enquiries that would have otherwise had to have been made to financial institutions operating in Guernsey.

2.22. It is proposed that the relevant legislative amendments will be made to enable the Revenue Service to require all financial institutions to register with the Revenue

Service, via the IGOR system, and that registration process will include a requirement for the financial institution to specify its classification for the purposes of FATCA and the CRS (determining whether it is a Reporting Financial Institution, and if so what type, or a Non-Reporting Financial Institution, and if so what type). It is further proposed that this registration process will be followed by an annual validation, to confirm that current registration details are accurate and complete and to ensure any changes to a financial institutions classification are reported to the Revenue Service in a timely manner.

2.23. Whilst this additional registration process does not impose an additional compliance burden on financial institutions (insofar as financial institutions will have had to make these determinations when FATCA and CRS were introduced and ensured they have maintained accurate records of those determinations), it is nonetheless recognised that there will be an additional requirement for slightly more information than is currently being provided to be extracted from their core systems and submitted to the Revenue Service. In view of this it is proposed that the additional requirement, for all financial institutions to register, will not come into effect until 1 January 2021 at the earliest.

2.24. As a result of the compliance reviews that the Revenue Service will be carrying out it is not unreasonable to conclude that the Revenue Service may discover cases where there are significant failings in respect of a financial institution meeting their legal obligations, under the FATCA and CRS reporting frameworks. Such a failure could include failing to carry out the relevant customer due diligence or account classification requirements under the frameworks, and could span the entirety of the financial institution's book of business.

2.25. Where there has been a failure to comply with legal obligations, the affected financial institution will be required to remediate the failings. However, in order to ensure Guernsey financial institutions are adhering to their obligations, the Revenue Service will need a level of assurance that the corrective measures put in place are a satisfactory resolution of the failings.

2.26. Whilst the Revenue Service has been allocated additional human resources to perform the required compliance reviews in respect of the international commitments, these activities are more akin to a regulatory role than those the Revenue Service has historically been required to perform. Therefore, whilst it is acknowledged that the Revenue Service, in this regulatory role, will focus on activities that seek to assist Guernsey financial institutions in complying with their obligations, where it is identified that there are significant failings it is proposed that relevant legislation be introduced to enable the Revenue Service to direct a non-compliant financial institution to appoint (at the cost of the institution) a suitably qualified independent person to oversee the remediation of the significant failings. This person would then be required to make a full disclosure to the Revenue Service detailing the full extent of the failings and the measures introduced to correct the reports previously submitted (if applicable) and give assurance that

future reporting, based on the revised policies and procedures, will be accurate and complete.

2.27. Both the CRS and FATCA frameworks include requirements for financial institutions to undertake due diligence procedures that are designed to determine whether a financial account that they maintain is held by a reportable person (being a person tax resident in a reportable jurisdiction). The due diligence procedures include the financial institution reviewing its own records (for CRS this is limited to accounts opened before 1 January 2016) to determine indicators of where the account holder appears to be resident and the financial institution requiring the account holder to provide certification of their jurisdiction(s) of tax residence (referred to as "self-certification"). The self-certification requirement is mandatory for all financial accounts opened after 1 January 2016.

2.28. The OECD, Global Forum have continually raised concerns regarding the possibility of financial institutions failing to obtain the self-certification from the account holder where they are obliged to, and account holders potentially providing false self-certifications (for example, stating that they are tax resident in a jurisdiction that is not considered to be a reportable jurisdiction, in order to avoid details of their financial account ultimately being reported to the jurisdiction where they are actually tax resident).

2.29. These concerns are included in the original commentary that formed part of the CRS published by the OECD, which included "… given that obtaining a self-certification for New Accounts is a critical aspect for ensuring that the CRS is effective, it is expected that jurisdictions have strong measures in place to ensure that valid self-certifications are always obtained for New Accounts …". This has also been reflected in the Terms of Reference for the AEOI Peer Review.

2.30. The existing Regulations that implement FATCA and CRS include provisions which would enable the Revenue Service to refer any person who was suspected of providing a financial institution with a false self-certification to Her Majesty's Procureur for consideration of prosecution under the Income Tax Law. However, in order to enhance the strong measures that are in place it is proposed that in the circumstances where a financial institution has either chosen to, or is required to, rely on self-certification from the account holder and:

- The financial institution is unable to obtain a valid self-certification from the account holder; or

- The financial institution, having received a self-certification from the account holder, and then having completed the required validation of the accuracy of the self-certification (referred to as the "reasonableness test") have reason to know that the self-certification is incorrect or unreliable,

the legislation will be amended to require the financial institution to notify the Revenue Service of this matter, the Revenue Service may then issue a notice to the financial institution requiring them to freeze the account until such time as a valid self-certification was received.

Enforcement in relation to non-compliance

2.31. The AEOI peer review Terms of Reference include a requirement that committed jurisdictions must have "effective enforcement mechanisms in place to address non-compliance by Reporting Financial Institutions". At present the Regulations that implement FATCA and the CRS utilise the existing civil penalties contained in section 193 of the Income Tax Law (with separate provisions covering criminal penalties for false statements). As the Revenue Service are developing the compliance strategy they have identified a number of areas where the existing legislation is not ideal, and could be improved to increase the effectiveness.

2.32. As an example, the existing provisions of section 193 of the Income Tax Law (as modified for the purposes of the CRS and FATCA by the respective Regulations) are sufficiently broad and, therefore, cover the ability for the Revenue Service to impose penalties for both late filing of a CRS or FATCA return and for the filing of an inaccurate CRS or FATCA return. There is, however, a nuance to CRS and FATCA reporting which the Revenue Service have had to consider when seeking to adopt a pragmatic and consistent approach to enforcement action in cases of non-compliance.

2.33. Taking a CRS report as an example, each financial institution is required to submit a report by 30 June each year, detailing all financial accounts that it maintains and which fall within the scope of the CRS. If a financial institution fails to submit its report by 30 June it is necessary for the Revenue Service to commence enforcement action. In accordance with the existing provisions of section 193 of the Income Tax Law this involves the imposition of an initial penalty of up to £300, followed by a continuing daily penalty of £50. The rationale being that the continuing nature of the penalty provides the non-compliant financial institution with an incentive to submit the outstanding return.

2.34. This penalty has to be applied at the "report level", since at the time of imposition the Revenue Service has no idea how many "accounts" will ultimately be included in the report when it is submitted.

2.35. The same section of the Income Tax Law would currently be applied in a case where the Revenue Service discovered a CRS report had been received that was materially incorrect or incomplete (where the maximum penalty is £1,000 in the case of negligence and £5,000 for fraud, with no recurring daily penalty). However, in this case, the Revenue Service would impose a penalty at the "account level" in respect of each incorrect or incomplete account. Therefore, in the case of an inaccurate CRS report, where 10 accounts were identified as being inaccurately reported, as a

result of negligence, the maximum penalty that could be applied would be £10,000 (despite all of those inaccuracies being contained in one CRS report). The difference in the level at which the penalty is applied, whilst falling within the scope of the existing provisions of the Income Tax Law, could lead to confusion.

2.36. Furthermore, in cases of inaccurate returns, as a result of negligence, the existing legislation requires the Revenue Service to have issued a notice convening a penalty hearing and if a financial institution were to submit a corrected report prior to the issue of such a notice no penalty can then be imposed. From a practical perspective, this would mean that the Revenue Service could carry out a compliance review, identify inaccuracies in the CRS reports, require the financial institution to quantify the number of affected accounts, and if they then did so, and provided a corrected report before the Revenue Service issued a notice convening a penalty hearing, then no penalty would be able to be applied.

2.37. In order to enable Guernsey to demonstrate that it has a robust framework to ensure compliance with the requirements under the Income Tax Law it is intended that the legislation will be amended, as follows:

- Section 193(1) of the Income Tax Law (as modified in the relevant CRS and FATCA Regulations) will be further modified to make it clear these penalties are applied only in respect of the late filing of reports;

- Section 193(1) of the Income Tax Law be amended to align it with section 190(1) so that it is no longer necessary to hold a hearing in advance of issuing a penalty notice for the late submission of a return, not being a return of income (and section 200 should be modified in consequence). For the avoidance of doubt, a customer's ability to appeal any such penalty notice (under either section 190 of section 193) would remain unchanged.

- To introduce a new provision to enable the Revenue Service to impose a higher daily penalty (up to a maximum of £1,000 per day) in circumstances where the person has failed to provide the required reports following 30 days of the imposition of the initial £300 penalty (and subsequent daily penalties of £50).

- To introduce a new, specific, penalty provision, to be applied at the account level, in the case of inaccurate or incomplete reports as a result of negligence or fraud. The new provision would, in the case of negligence, have a proviso that no penalty would be imposed if at any time before the Revenue Service institutes enquiries (including notification of an onsite compliance review) the financial institution makes a full and complete disclosure of inaccuracies or omissions contained in a report and provides a corrected report. Where a penalty is to be imposed in respect of negligence, the maximum penalty would be based on 0.5% of the balance or value of the account(s), or where this was as a result of fraud, it would be based on 1% of the balance or value of the account(s). In the case of accounts that were closed in a reportable period,

when submitting CRS or FATCA reports, no account balance or value is reported. In this scenario the maximum penalties in respect of each of those accounts would be £1,000 in respect of negligence and £5,000 for fraud.

- Section 190 of the Income Tax Law be amended to repeal the provisions which, in certain circumstances, result in companies only being liable to a maximum penalty of £50 for late delivery of their returns of income. Instead all companies which fail to submit a return on time will incur the maximum penalties of £300, plus £50 per day for each day of continuing non-compliance.

2.38. The above recommended amendments to the Income Tax Law and regulations thereunder seek to ensure Guernsey has in place the relevant strong measures, which are commensurate with the seriousness of the failure, necessary to meet the international tax commitments made and provides the sufficient legislative basis for the required compliance frameworks. The practical application of the compliance strategies will continue to be developed, learning from experience and engagement with industry, and to that end the Revenue Service are in the process of liaising with relevant industry professional associations to obtain expressions of interest to join a Working Party for that purpose.

Mandatory Disclosure Rules

2.39. Despite the introduction and implementation of the CRS which created even greater transparency and cooperation between tax administrations across the globe, there remains concerns (following academic studies and results from the OECD's disclosure initiative) that arrangements and schemes exist globally which seek to circumvent CRS reporting, consequently further preventative controls have been considered.

2.40. Following a call from the G7 Finance Ministers in May 2017, the OECD Committee of Fiscal Affairs approved the Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures ("MDR") in March 2018. Whilst not being endorsed as an international standard, these rules are considered a best practice based on the principles of the Base Erosion and Profit Shifting initiative ("BEPS") Action 12 Report.

2.41. The objective of the MDR is to bolster the integrity of the CRS by introducing measures to discourage advisors and intermediaries promoting certain avoidance schemes. The method chosen to achieve this objective is through an obligation to disclose information on the schemes, their users and suppliers to the relevant competent authority in the jurisdiction where they reside.

2.42. In May 2018, the EU issued EU Directive 2018/822, known as DAC6. The Directive included amendments to Directive 2011/16/EU as regards the mandatory automatic exchange of information in the fields of taxation in relation to reportable

cross-border arrangements. The result is that there are two model frameworks, one published by the OECD, the other being implemented by the 28 EU Member States.

2.43. There are significant distinctions between the DAC6 reporting requirements and the MDR, fundamentally these include the circumstances where a requirement to make a disclosure would be triggered, which are summarised as follows:

DAC6	MDR (CRS & Opaque Offshore Structures)
Hallmark A – Generic hallmarks linked to the main benefit test (broadly, schemes that are marketed for tax avoidance)	Rule 1.1 – CRS Avoidance Arrangements (any arrangement where it is reasonable to conclude it is designed to circumvent the CRS)
Hallmark B – Specific hallmarks linked to the main benefit test (broadly, schemes that involve structuring in order to achieve tax avoidance)	Rule 1.2 – Opaque Offshore Structures (a legal person or arrangement that does not carry on substantive economic activity where the beneficial ownership is unclear)
Hallmark C – Specific hallmarks related to cross-border transactions (includes deductible cross-border transactions to a jurisdiction that has a 0% or almost 0% of tax)	
Hallmark D – Specific hallmarks concerning AEOI and beneficial ownership (being the equivalent of the MDR, CRS & Opaque Offshore Structures model published by the OECD)	
Hallmark E – Specific hallmarks concerning transfer pricing (including arrangements involving hard to value intangibles)	

2.44. Guernsey made a political commitment, in response to the EU Code of Conduct Group's investigation of the tax policies of third countries to the European Union, to introduce, by 31 December 2019, legislation that will enable the implementation of MDR (in alignment with the timescale that countries within the EU are working towards). This followed public consultation, in August 2018, on both economic substance requirements and the introduction of MDR. A similar commitment was given by the other Crown Dependencies with whom the development of an approach has been co-ordinated.

2.45. As detailed above, the MDR framework is designed to require those persons involved in either the promotion, design, marketing, implementation or management of a relevant arrangement or structure in Guernsey, to be legally obligated to report the existence of the arrangement or structure and the users of

it to the Revenue Service. The Revenue Service will then exchange the relevant information with those jurisdictions in which the users are resident, subject to the relevant international exchange relationships being in place.

2.46. A main driver for introducing a disclosure regime in Guernsey is to meet part of the obligations Guernsey had made when adopting the CRS, as this is a framework that assists in determining the existence of CRS avoidance arrangements, which forms part of the AEOI FI Compliance Strategy. It is therefore intended to implement the OECD MDR. It is expected that this will also be the preference in the other Crown Dependencies.

2.47. As the MDR is a published best practice from the OECD, there are already Model Rules, which include the following:

- The Hallmarks that trigger a requirement to make a disclosure;
- A definition of an intermediary segregated into i) Promoters and ii) Service Providers;
- When and what information is to be disclosed; and
- Details of a requirement to ensure there is a framework for enforcement mechanisms to deal with cases of non-compliance.

2.48. Whilst the model rules also contain commentary which seeks to elaborate further on the defined terms, it is acknowledged that the Revenue Service will need to provide some Guidance Notes. It is intended that such guidance will, where possible, be aligned across the Crown Dependencies on a principles basis.

2.49. The Revenue Service published a Briefing Note concerning MDR on 1 October 2019 to reiterate the commitment that Guernsey had made and raise awareness of further developments that the Crown Dependencies had established, following discussions with the OECD over the summer, regarding the practical application of the MDR. A specific webpage has also been created to provide the public with updates concerning the implementation of the MDR (https://www.gov.gg/mdr).

2.50. The Briefing Note summarised a number of the key elements, such as:

- The definitions of “Promoter” and “Service Provider” being the persons that will be required to make reports of any relevant arrangements or structures;
- The definition of a “CRS Avoidance Arrangement” and a “Passive Offshore Vehicle” (the existence of which would trigger a reporting requirement);

- Highlighting that determining whether an arrangement or structure sought to avoid the CRS would require "a reasonable to conclude test" and included some scenarios, as examples;

- Explained that any disclosures would be required to be made within 30 days of the date an intermediary makes a CRS Avoidance Arrangement or Opaque Offshore Structure available, or first provides Relevant Services to such an arrangement or structure;

- Highlighted that the Model Rules included only one element of legacy reporting, namely a requirement specifically for Promoters. This applies in respect of any CRS Avoidance Arrangements created on or after 29 October 2014 and before the effective date of the MDR coming into force in Guernsey. Any Promoter who made such an arrangement available would be required to disclose the details within 180 days of the MDR coming into force. There is however a de minimis threshold suggested in the MDR, which means that if immediately prior to the arrangement being implemented the Promoter has documentary evidence to confirm the aggregate balance of value of the Financial Account was less than US$1,000,000, the arrangement would not need to be disclosed; and

- It is intended that relevant intermediaries who have to make disclosures to the Revenue Service would do so in the required electronic template using the Revenue Service's existing software solution (IGOR), which will be further developed for this purpose.

2.51. Whilst it will be necessary to introduce the relevant legislation implementing MDR by 31 December 2019, in order to meet the commitment made to the EU, it is intended to coordinate the approach to the timing of the first disclosures to be made in step with the other Crown Dependencies to enable an aligned implementation across each island.

2.52. The Revenue Service will continue their engagement with industry via the existing Working Group that deals with the implementation of economic substance and the new Working Group that is in the process of being created to deal with the practical application of Revenue Service compliance strategies.

2.53. It is, therefore, recommended that the States of Deliberation declare that the MDR is an international tax measure, in accordance with section 75CC(1C) of the Income Tax (Guernsey) Law, 1975, as amended and instruct the Policy & Resources Committee to make such Regulations that are necessary to implement the provisions of the MDR in Guernsey.

Assistance in Collection (Article 27 of the Guernsey/UK Double Taxation Agreement)

2.54. The inclusion of an Article covering Assistance in Collection in the Guernsey/UK DTA was previously detailed in the Policy Letter dated 2nd October 2018 (Billet d'État XXVII, Article 23), in which it was explained that the text was based on OECD Model text, which is designed to enable each territory to assist the other in collecting delinquent tax debts, and was the biggest departure from DTAs previously entered into by Guernsey.

2.55. Whilst the Guernsey/UK DTA was ratified in the December 2018 States meeting, and the relevant exchange of letters was subsequently concluded between Guernsey and United Kingdom, resulting in the DTA entering into force in Guernsey on 1 January 2020, the provisions of Article 28 of the Agreement meant that the Assistance in Collection provision (Article 27) would only come into effect from a date specified in a separate exchange of letters. This was necessary to allow both territories to discuss the practicalities regarding the Article and to also ensure legislation permitting the collection of tax for another territory was in place.

2.56. The Policy Letter dated 2nd October 2018 explained that, at that time, discussions with HMRC were ongoing and it would also be necessary to consult with the Law Officers.

2.57. The discussions with HMRC have advanced to a stage where a Memorandum of Understanding between the Revenue Service and HMRC ("the MOU") concerning the Assistance in Collection Article is nearing completion. During the course of the drafting of the MOU both parties have agreed the following practical aspects of the application of the Article:

- The Article and MOU will be applied in accordance with the OECD Commentaries on the OECD Model Tax Convention and the OECD Manual on Assistance In Collection of Taxes, ensuring we will be applying the provisions in a consistent fashion;

- In respect of UK tax debts that Guernsey will assist with the collection of, those debts may arise from any of the taxes arising under the UK Taxes Acts (therefore, will include Income Tax, Corporation Tax, Capital Gains Tax, VAT and Excise duties). For the Guernsey tax debts, that the UK will assist with the collection of, these will be any debts arising under the Income Tax Law;

- In order to ease the administrative burden neither party will ask the other for assistance where the taxpayer's debt (either a single debt or consolidated debts) is less than £10,000;

- Furthermore, neither party will ask for assistance in cases where the debt is more than 5 years old;

- In accordance with the Assistance in Collection Article, the revenue claim has to be such that the debtor cannot, at the time of requesting assistance, prevent its collection under the laws of the territory making the request. This means that it is not necessary for the requesting party to have obtained a court judgment in their jurisdiction prior to being able to make a request for assistance. Both parties will include in the requests for assistance a document referred to as an Instrument Permitting Enforcement, which will provide the relevant assurances concerning the enforceability of the debt; and

- It has been agreed that the issue of costs will follow the same basis as that of the Tax Information Exchange Agreement ("TIEA") with the UK, therefore the ordinary costs of providing assistance will be borne by the party providing assistance and any extraordinary costs (such as legal costs for carrying out a procedure that is not ordinarily used to collect debt) will be borne by the party requesting the assistance (but before any extraordinary costs are incurred the requested party must check with the requesting party to ensure consent is obtained to do so).

2.58. The discussions with HMRC have been extremely helpful in clarifying that neither party is, when providing assistance in collection, expected to apply measures over and above those that are available when seeking to collect its own debt. In fact, once a request for Assistance in Collection is accepted, the debt is then considered a domestic debt, and so in Guernsey's context, the enforcement action undertaken to assist the UK, will replicate the action the Revenue Service would carry out for any other Guernsey tax debt.

2.59. In order for the UK tax debt to be recognised in Guernsey, it is proposed that the Income Tax Law should provide for the Revenue Service to issue a notice to that effect. As the debt will then be treated as a Guernsey tax debt, the Revenue Service will consider the priority of its collection as it would with any domestic debt (i.e. so in the case of a Guernsey resident customer, with a Guernsey income tax debt and a UK tax debt, which was subject to a request for assistance in collection, the debt collection activities will be prioritised based on the age of the debt, with the oldest debt being collected first).

2.60. Treating the debt as a Guernsey debt, and not being required to undertake measures that it would not pursue for its own debt, means that the Revenue Service would only pursue debt collection measures such as saisie proceedings at the request of HMRC and where it would be capable to do so for its own debt, based on factors such as the value of the debt and the expected amount of available assets from which the debt could be collected (and whether HMRC had given consent to meeting the potential extraordinary costs that may be incurred).

2.61. The provisions of paragraph 3 of Article 27 of the Guernsey/UK DTA sets out that "… When a revenue claim of a Territory is enforceable under the laws of that Territory and is owed by a person who, at that time, cannot, under the laws of that Territory, prevent its collection, that revenue claim shall, at the request of the

competent authority of that Territory, be accepted for the purposes of collection by the competent authority of the other Territory …". Paragraph 6 of Article 27 further clarifies "… Proceedings with respect to the existence, validity or the amount of a revenue claim of a Territory shall not be brought before the courts or administrative bodies of the other Territory … ".

2.62. This mirrors the framework for the exchange of (tax) information on request where, for example, the OECD Model Agreement on Exchange of Information on Tax Matters, details (in the Article dealing with the exchange of information) that "… The competent authority of the requested Party shall provide upon request information for the purposes referred to in Article 1 …" and in the Article which covers the grounds for possibly declining a request for the exchange of information includes "… A request for information shall not be refused on the ground that the tax claim giving rise to the request is disputed …".

2.63. In view of the these complimentary frameworks that govern both the Assistance in Collection and the Exchange of (Tax) Information on Request, it is proposed that section 75C of the Income Tax Law will be amended to:

- In section 75C(1) detail that the Director shall exercise her information gathering powers and the relevant framework to implement Assistance in Collection, pursuant to an approved international agreement. Currently the section provides that the Director "may" exercise her powers and this element of discretion may cause issues in Guernsey meeting its international obligations.

- Section 75C(2) will be repealed as in light of recent experience the provisions of this subsection have been interpreted in a way that it was not intended and which could be considered to be contradictory to the relevant international agreements (including the Assistance in Collection Article of the OECD Model Tax Convention and the OECD Model Agreement on Exchange of Information on Tax Matters), where, for example, the commentary in the latter states that "… Paragraph 1 provides the general rule that the competent authority of the requested Party must provide information upon request for the purposes referred to in Article 1 …" and reiterates that "Paragraph 5 clarifies that an information request must not be refused on the basis that the tax claim to which it relates is disputed …". The result of this amendment would mean that for both Exchange of (Tax) Information on Request and Assistance in Collection there was no ambiguity that the Revenue Service must provide the relevant assistance upon receipt of a valid request, in accordance with the international agreements that Guernsey has committed to.

2.64. This Policy Letter also recommends amending the Income Tax Law to enable the Revenue Service to implement the provisions of the Assistance in Collection Article contained in the Guernsey/UK DTA, which will include:

- Introducing the relevant provisions to enable the Revenue Service to issue a Notice (including by electronic means) of the debt, such a document being conclusive for the purposes of any court proceedings;

- Introducing an appeal right against a Notice of Debt, specifically limiting the grounds of appeal so as to ensure a dispute as to the amount of debt cannot be subject to appeal in Guernsey and only the validity of the Notice of Debt can be appealed (taking into consideration the existing provisions of section 208D of the Income Tax Law regarding formal defects not to invalidate assessments, etc). Such appeals being before the Guernsey Tax Tribunal;

- Amending section 83 of the Income Tax Law to enable the Revenue Service to obtain valid service of court summons by post, to the last known address of the person.

- All such other consequential and ancillary amendments as are necessary to give effect to the AIC provisions.

3. Recommendations

It is recommended that the Income Tax (Guernsey) Law, 1975, as amended ("the Law"), and regulations thereunder, should be revised to:

3.1. Provide the Revenue Service with the power to undertake onsite visits in respect of business premises from which a person is or may be operating, for the purposes of reviewing compliance with the Common Reporting Standard ("CRS") and any other matters relating to income tax or international tax measures;

3.2. Place a requirement for all financial institutions, operating in Guernsey, to register with the Revenue Service and, when doing so, detailing their classification for the purposes of CRS and the Foreign Account Tax Compliance Act ("FATCA");

3.3. Enable the Revenue Service to issue a notice to a financial institution to complete corrective remedial actions, related to CRS and/or FATCA reporting and in the case of significant non-compliance to be required at its own cost to appoint a suitably qualified independent person for the purposes of determining the full extent of the non-compliance, overseeing the repair, validating that the corrective measures have moved the financial institution into a compliant position, and making a relevant disclosure to the Revenue Service confirming this position;

3.4. Require financial institutions to report to the Revenue Service all account holders where they have been unable to obtain valid self-certification for the purposes of CRS and/or FATCA due diligence procedures. To then enable the Revenue Service to serve a notice to the financial institution to require them to freeze the account, until such time as the accountholder provides valid self-certification;

3.5. Amend section 193 of the Law (as modified in the relevant CRS and FATCA Regulations) to make it clear these penalties are applied only in respect of the late filing of reports;

3.6. Amend the provisions contained within section 193(1) and section 200 of the Law, to make it clear that where a person has failed to deliver a return, other than a return of income, by the filing deadline, the Revenue Service may automatically impose a penalty, without the requirement to issue a notice stating the grounds of their belief and providing the person with a reasonable opportunity to state their case (without prejudice to the person's right of appeal);

3.7. Enable the Revenue Service to impose increased levels of daily penalties, in the exceptional cases where a person continues for more than 30 days after the imposition of the original penalty not to meet any of its reporting or filing obligations under the Law;

3.8. Enable the Revenue Service to impose specific penalties for the submission of CRS/FATCA returns which are incorrect or incomplete in a material particular where the maximum penalty to be imposed is based on a percentage of the balance or value of accounts, that were not reported;

3.9. Amend section 190 of the Law so that where a company fails to deliver a return of income within the current maximum penalty of £50 where the company, for example, has no income or profits in the period for which the return is required will no longer apply; and

3.10. make necessary amendments to the Income Tax (Guernsey) Law, 1975, in order to be able to implement the provisions of the Assistance in Collection Article contained in the Double Taxation Agreement between Guernsey and the United Kingdom.

That the Policy & Resources Committee be instructed to:

3.11. make Regulations, to be laid before the States, in accordance with section 75CC of the Law, to implement the Mandatory Disclosure Rules relating to CRS Avoidance Arrangements and Opaque Offshore Structures, as published by the OECD; and

That –

3.12 the MDR shall, in accordance with section 75CC(1C) of the Income Tax (Guernsey) Law, 1975, be specified for the purposes of that Law as an international tax measure (the provisions of which may accordingly be implemented by regulations of the Policy & Resources Committee under section 75CC(1A) of that Law).

To direct the preparation of such legislation as may be necessary to give effect to the above proposals.

4. Compliance with Rule 4

4.1. Rule 4 of the Rules of Procedure of the States of Deliberation and their Committees sets out the information which must be included in, or appended to, motions laid before the States.

4.2. In accordance with Rule 4(1), the Propositions have been submitted to Her Majesty's Procureur for advice on any legal or constitutional implications.

4.3. In accordance with Rule 4(3), there are no Propositions which request the States to approve funding.

4.4. In accordance with Rule 4(4), it is confirmed that the Propositions attached to this Policy letter have the unanimous support of the Committee.

4.5. In accordance with Rule 4(5), the Propositions relate to the duties of the Committee in raising and collecting taxes and revenues and executing and requesting the extension of international agreements to which the Island is invited to acquiesce.

Yours faithfully

G A St Pier
President

L Trott
Vice-President

A Brouard
J Le Tocq
J Stephens