

Offshore Voluntary Disclosure Initiative (OVDI)

The purpose of this Alert is to discuss the Australian Taxation Office's Offshore Voluntary Disclosure Initiative, which will end on 30 June 2010.

The OVDI was introduced by the Australian Taxation Office (ATO) in July 2007 and updated in November 2009.

Under this initiative, taxpayers can voluntarily disclose, to the ATO, any undisclosed overseas income or over-claimed deductions involving international transactions.

Very broadly, taxpayers who make a voluntary disclosure by 30 June 2010 would receive the following benefits:

1. If the taxpayer's additional taxable income is \$20,000 or less for an income year, the taxpayer will not have to pay a shortfall penalty for that year.
2. If the taxpayer's additional taxable income exceeds \$20,000 for an income year, the taxpayer's shortfall penalty will be remitted to 10% of the additional tax for that year.
3. The general interest charge (GIC) will be reduced to zero for the income years up to and including the 2002 income year.
4. The GIC will be reduced to the base rate for the 2003 and 2004 income years.
5. Shortfall interest charge (SIC) applies for 2005 and later income years at the normal rates.
6. The GIC may be further remitted where the total primary tax, shortfall penalty and GIC (but not SIC) exceeds 70% of the income voluntarily declared.
7. The ATO will indicate whether they will refer the taxpayer's disclosure for investigation to determine whether there is any potential breach of criminal law (see further details below).

For those who do not disclose voluntarily, there is the risk of being audited, in which case the penalties would be higher.

Who are not eligible?

Those that are **not** eligible to receive the above benefits from the OVDI are taxpayers who:

1. are currently being audited by the ATO, with regard to omitted income, capital gains or over-claimed deductions that the taxpayers want to disclose;
2. have received a s264 notice (ie a notice to require the taxpayer to provide information under s264 of the *Income Tax Assessment Act 1936* (Cth)), requiring the taxpayer to provide information relating to the foreign income, capital gains or deductions, to the ATO;
3. derive their foreign income and offshore assets from criminal activities, other than tax offences (that is, the taxpayers engage in activities that are prohibited and punishable under the criminal law, broader than tax evasion. This includes illegal trafficking or dealing in drugs, firearms, explosives or destructive devices, illegal prostitution, human trafficking, financial scams, fraud (other than tax fraud), counterfeiting, forgery, software piracy, e-crime etc);
4. have been engaged in promoting tax evasion schemes; and
5. are currently under criminal investigation for tax offences.

Criminal investigation

When the ATO evaluates the taxpayer's disclosure, they will also decide whether they can give the taxpayer an indication as to whether they are likely to refer the taxpayer's circumstances for criminal investigation.

Where a taxpayer makes a full and true voluntary disclosure of a tax shortfall amount (including the facts relating to the shortfall, their involvement in a scheme, any promoter of the scheme, and the associates of the taxpayer and of any promoter), the ATO gives considerable weight to this as a mitigating factor.

In serious cases, the ATO will continue to undertake investigations into potential breaches of criminal law.



When making the voluntary disclosure, taxpayers should consider and should obtain legal advice on whether the activities they will disclose could constitute a criminal offence.

Income tax assessment amendment period

When making a voluntary disclosure, taxpayers should consider what would be the relevant income tax assessment amendment period. In other words, which income tax returns can the ATO amend?

The income tax returns which the ATO can amend will depend on the taxpayer's individual circumstances.

The ATO has an unlimited amendment period where there has been fraud or evasion.

Where there is no fraud or evasion, the ATO can amend the taxpayer's returns for a period of generally up to four years. The four year amendment period applies to taxpayers involved in tax avoidance arrangements for the 2004/05 and later income years. A six year amendment period applies to earlier years.

Taxpayers can still make a voluntary disclosure under the OVDI for income years outside the amendment period, in addition to the four or six-year amendment period.

What is fraud or evasion?

When making a voluntary disclosure, taxpayers should consider if the activities disclosed constitute fraud or evasion for the purpose of determining the income tax amendment period.

Case law confirms that for the purpose of determining the income tax assessment amendment period, 'fraud' means:

"the making of a statement to the Commissioner relevant to the taxpayer's liability to tax which the maker believes to be false or is recklessly careless whether it be true or false"

(*Kajewski & Ors v FC of T* 2003 ATC 4375; 52 ATR 455 at ATC 4400; ATR 483, per Drummond J).

In the High Court decision on *Denver Chemical Manufacturing Co. v Commissioner of Taxation* 79 CLR 296, Dixon J stated that evasion means:

"more than avoid and also more than a mere withholding of information or the mere furnishing of misleading information...some blameworthy act or omission on the part of the taxpayer ...is contemplated. An intention to withhold information lest the Commissioner should concede the taxpayer liable to a greater extent than the taxpayer is prepared to concede, is conduct which if the result is to avoid tax would justify finding evasion."

In other words, evasion includes intentionally omitting income from the return without a credible explanation.

Named or no-named disclosure

When making a voluntary disclosure, taxpayers may do so either on a named or a no-name basis. The ATO does not consider a no-name disclosure to be a complete disclosure until the taxpayers have provided their identity and any other names that were withheld, within the timeframe stated by the ATO.

OVDI tips and traps

1. The ATO's indication that it will not initiate a criminal investigation will not bind any other agency (such as the Commonwealth Director of Public Prosecutions, Australian Federal Police and the Australian Crime Commission).
2. If there is fraud or evasion, the income tax assessment amendment period is unlimited.
3. The ATO looks closely at the reasons for omitting the offshore income (or overclaiming the deductions) in the first place. Accordingly, this is a very important part of the disclosure.

Conclusion

The offer under the OVDI ends on 30 June 2010. We consider that the ATO is unlikely to extend this deadline. When making a voluntary disclosure, taxpayers should carefully consider their relevant income tax assessment amendment period, and whether the activities they disclose constitute fraud or evasion, or a criminal offence.



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