



# Taxing Matters

## Season 2 Episode 9 | Sanctions Spotlight Session with Alice Kemp

**Alexis** Hello and welcome to Taxing Matters, your one stop audio shop for all things tax, brought to you by RPC. My name is Alexis Armitage and I am a Senior Associate in RPC's Tax Disputes Team. Our regular listeners will wonder why I am hosting today's Taxing Matters podcast? Well, it is with a heavy heart that I have to tell you that our fabulous Alice Kemp is leaving as Taxing Matters host and is, therefore, handing the podcast baton over to me! There is no doubt that I have some big shoes to fill, but I shall do my absolute best to fill them for all of our loyal listeners.

I will be your new guide as we explore the sometimes hostile and ever-changing landscape that is the world of tax law and tax disputes. Taxing Matters brings you a roadmap to guide you and your business through this labyrinth. In case any of you miss any crucial information - or just want some bedtime reading - there is a full transcript of this and indeed every episode of Taxing Matters on our website at: [www.rpc.co.uk/taxingmatters](http://www.rpc.co.uk/taxingmatters).

So, to begin! I can't think of a better way to start my new podcast journey than by having none other than Alice Kemp herself as my first podcast guest. Time to turn the spotlight on Alice Kemp:

Alice is a barrister who specialises in both civil and criminal fraud investigations and litigation conducted by regulatory bodies. She has assisted both corporate and high net-worth individuals in complex criminal investigations and conducted internal investigations for a range of offences. Alice has assisted a number of corporates and charities with the creation and implementation of robust policies and procedures to address risks posed by bribery and corruption, tax evasion, regulatory offences, money laundering and sanctions. Alice forms part of RPC's "Sanctions Group" and has advised financial institutions, corporates and charities on the sanctions impacts of transactions, has advised on the application of export control provisions to international trade and assisted with queries around listing and delisting of individuals under the UK, EU and UN sanctions regimes.

So, Alice welcome to Taxing Matters, you're on the other side of it today!

**Alice** Thanks Alexis. It's so weird to be on the other side to be a guest on the podcast but I'm so thrilled that 1) you are taking over as a very apt host and 2) to be here.

**Alexis** Fabulous! As Alice is something of an expert on sanctions it seems only fitting that Alice and I should talk about sanctions today. Let's start at the beginning. Most people know the term sanctions, but what does it mean, Alice?

**Alice** Sanctions derive from one place - legally speaking - from the Sanctions and Anti-Money Laundering Act 2018 and the various regulations made under it. The regulations each set up a sanctions regime, as they call them, and they help to meet a particular goal which can be to stop an illegal war or insurrection, to restrict the actions of a corrupt government, hinder the impact of a terrorist group, promote peace and security or otherwise fulfil the UK's international aims. And these regimes can be by country, such as the North Korean or Syrian regimes, or by groups such as the Da'esh, or Al-Qaida regime, or by theme such as cyber crime, or human rights regimes. Broadly speaking - and very broadly speaking - there are two types of sanctions: financial sanctions - which restrict named persons or groups and what they can and can't do with their funds - and resources and trade sanctions which restrict where goods and services can be provided to. There're also export controls, but that's slightly beyond the scope of what we're talking about and relate to the *actual* items that we're talking about.

In the UK financial sanctions are regulated by the Office of Financial Sanctions Implementation, OFSI and most trade sanctions - very large emphasis here on *most* trade sanctions - are regulated, or at least somewhat-overseen, by the Export Control Joint Unit. That can also be any other specialist body. The Department for Trade has some influence, the Ministry of Defence sometimes has some influence. There are various other bodies that can have interests in these various trade sanctions regimes.

**Alexis** But I mean, sanctions are old news aren't they?

**Alice** Exactly! And this is one of those things that comes up time and again is that we've been talking about sanctions 'ad nauseum' for about the last two years - since geopolitical events took a bit of a turn - and there's been a massive increase in the number of persons that have been designated under the sanctions regimes: countries developing and implementing sanctions, counter sanctions, enforcement and compliance sanctions being taken by various national regulators. So, even just thinking about the UK's focus, in August - just this past month - HMRC announced that it had fined a company £1 million for trade sanctions violations and OFSI has started using its 'naming and shaming' powers. These are signs and indications that, while sanctions have been around for a while - the first recorded use being in 432BC - they're still relevant and they're still something that businesses and individuals very much need to take into consideration because they are at the forefront of regulators' minds.

**Alexis** Thank you that's very interesting. So, who needs to comply with these sanctions?

**Alice** Well, by and large sanctions need to be complied with by the citizens of that country and that is wherever they are. So, UK citizen, they need to comply with UK sanctions even if they're in Thailand. And they also need to be complied with by any business incorporated under the laws of that country. So, UK incorporated companies need to comply with UK sanctions. Even when transacting in the US, for example, they need to comply with UK rules as well.

They also need to be complied with by anyone who's doing business in that country. So, again, looking at the UK any French and German companies who are doing business in the UK will need to comply with UK sanctions rules as well as their own French or German regulations. But, how this is interpreted can vary based on the jurisdiction. For example, some countries consider that having a transaction dominated in their currency. So, if you've got a contract, for example using USD, that will be enough to trigger that country's sanctions regime and mean that that sanctions regime has to be complied with. Some countries require not just their citizens to comply with their sanctions but anyone holding a residence permit. Some countries say that their sanctions regime extends beyond their borders, some say, "no, it's just when you're in our country". So, it's important to note that there are a large number of people who are going to need to comply with the sanctions regimes of more than one country including myself. I need to make sure I comply with the UK regime and also the New Zealand regime. Those people might be living and working in a different country, or hold a different nationality, or a different residence requirement. It's incredibly important information for employers, in particular, to be aware of - of who, exactly, they've got working on a matter and what sanctions regime is going to be brought in as a result of that particular nationality. It can be quite tricky where the sanctions regimes either don't quite align, or even worse a counter to each other so I'm thinking specifically here about Russian counter sanctions, which some people may have an obligation to comply and to not comply at the same time.

**Alexis** Yeah, that sounds quite tricky - as you said - if somebody's subjected to two regimes at the same time.

**Alice** Exactly.

**Alexis** So, obviously very important to keep on top of it. So, how do financial sanctions impact tax advice and accountancy?

**Alice** There's two answers to that question. The first is that there is a financial sanctions matter that needs to be taken into consideration and the second is a trades sanctions matter. Dealing first with the financial sanctions matter: If a person is designated so they appear on one or more country's sanctions lists - In the UK we call them either "sanctioned persons" or "designated persons", the same terminology in the EU - if someone appears on those lists it's prohibited to deal with their funds or economic resources, or make funds or economic resources available to them or for their benefit. It's also prohibited to do anything which would circumvent the impact of sanctions. Now, this will work where you're providing advice if you're charging for it, for example. So, providing the advice might not be a problem but they can't pay you for it - you can't take money off them. You can't give them an account, you can't render an account. So, those are queries that

will arise in relation to designated persons and that's that financial sanctions aspect that we were speaking about earlier.

I should also say that will apply to any entity which is owned, or controlled, by a designated person. Now, ownership and control is tricky; it's not the clearest test. The US has - I have to say and I am very sorry to say - done this *slightly* better. The US takes the approach of listing the entities which are owned or controlled by a designated person. The UK and the EU take a bit of a different approach which is: 'you work it out!' In the UK the test is whether a person directly or indirectly holds more than 50% of the shares or voting rights. If they have the right to appoint or remove the majority of the board of directors or - and this is the really tricky one - "where it would be reasonable having regard to all of the circumstances to expect that the designated person could, if they chose, by whatever means - directly or indirectly - achieve the result that the affairs of the company are conducted in accordance with the designated person's wishes.". Not only a mouthful but, actually, *really* tricky to apply.

So how do you, as a private person, work out if a company is being directed from behind the scenes by a shadow director, or someone who's exercising de facto control? It's really hard and it can arise in the most unlikely situations where you have no reason to suspect that, in fact, often that's *exactly* why people are doing it so that you have no reason to suspect it. It makes this control point really, really tricky to work out so it's basically 'do your best', try and get as much information to get comfortable if there are any risks.

**Alexis** Absolutely. What about trade sanctions?

**Alice** Since 21st July 2022, a ban has been in place in providing accounting, or auditing services, to any person connected with Russia and that's in relation to regulation - you don't need to know this, it will not be on the test later - but it's 54C of the Russia (Sanctions) (EU Exit) Regulations 2019 - for anyone playing at home. The ban currently prohibits various different parts of the accounting services and auditing services being provided to persons connected with Russia.

Let's talk about the services first: The services that it talks about are things like preparation of annual interim financial statements and accounting information, compilation of financial statements from information provided by a client. Now, there's a difference here. Preparation of tax returns in accordance with preparation of financial statements is prohibited. Preparation of tax returns *by themselves* not prohibited. Where's the justification? I suspect it's because the UK Government still wants to get tax revenue.

Other services which cannot be provided such as giving valuations or preparing pro-forma statements, book-keeping services and then there's auditing services. There's a restriction on auditing services and basically it's giving any kind of support or expressing any kind of opinion about the financial viability of a company during their accounting period in accordance with the auditing principles. That is a prohibited service.

The key to this is that it can't be provided to persons connected with Russia, which has a definition. It's a very technical definition. It's again slightly hard to apply. There are four elements to this definition: Individuals that are ordinarily resident in Russia. Individuals that are located in Russia. Entities - which is companies, partnerships, legal entities - which are incorporated in Russia, or entities which are instituted under the laws of Russia, or domiciled in Russia. That's the four parts of that test. The one that trips people up most - it's reasonably easy to work out if something's been constituted under the laws of Russia, or incorporated under the laws of Russia, or is located in Russia. Ordinarily, "resident" is a lot more tricky. No one's quite sure what the definition of "ordinarily resident" is. So, it could be: ordinarily resident under immigration principles, or it could be ordinarily resident under tax principles, or it could be any mix of those tests and it is slightly difficult to apply, but, in general, the closer the person's connections are to Russia the more likely they are to be regarded as ordinarily resident there. If they have Russian citizenship and that said they left when they were two, they haven't been back since, they were educated abroad all of those kinds of things they're probably not a person connected with Russia, but, again - like with the ownership and control test - it's a matter of checking, documenting and then making your own judgement.

**Alexis** Thank you! That's really helpful, I think, to anybody that's dealing with this at the moment. So, is that it or are there any exceptions?

**Alice** This is a very important point to note: There are exceptions where it is recognised that it is of benefit to UK society. Despite the fact that we want to restrict these services as being provided to persons connected with

Russia, it's of benefit to the UK and its society for certain things to continue and they're things like ' discharging statutory obligations - such as filing tax returns and paying tax. Or, ensuring that the financial health of a company listed, for example, on the London stock exchange, is still known, or that financial performance - and particularly indicators of poor financial performance - are known to counter parties who might be considering entering into transactions with that company.

So, the exceptions are around things like discharging and complying with obligations that are statutory or regulatory obligations in the UK. Now, the important point to note about that is it does not include contractual obligations, so if you have just entered into a contract to do something, that is not enough to fall within one of these exceptions. Then it's important to be able to audit, particularly subsidiaries of credit institutions so that we know that they have adequate financial health to continue to operate in the UK markets. Auditing something that is falling within group accounts, or will be a subsidiary undertaking and has therefore got a UK obligation, or if the business is only part owned by a person connected with Russia and the other part is owned by people not connected with Russia who still need to comply with UK obligations. So those are the kind of exceptions that there are. But the restrictions are incredibly broad and the exceptions are very, very narrow. So, it makes it really important that you understand more about the degree of what you are doing and how it may, or may not, fall within these specifically narrow exceptions.

**Alexis** Thank you, I think that's really useful. So, what happens if there is a breach then?

**Alice** A couple of things. The first is that, if there is a breach of any of these financial sanctions obligations, there are obligations on auditors, accountants and tax advisors because they fall within the definition of a relevant firm. So, they have obligations to report certain matters to OFSI - a fail to report is also a criminal offence, so this is quite an important obligation to get right. The reporting obligations arise where a person knows, or has reasonable cause to suspect, that someone is a designated person - it may be one of their clients, may be one of their clients' owners, may be a third party, may be a counterparty's owner. If the firm that the person works for holds any funds, or property on behalf of the designated person - this is most common where someone is designated overnight so you hold client funds on account, they are designated, you suddenly hold designated person funds on account - you are going to need to report that to OFSI; and there is a specific form and a specific way that you do that. The third one is, again, more tricky. It's where a person "knows, suspects, or has reasonable cause to suspect that there has been a breach of sanction by any person anywhere in the world". This is where people can get tripped up because it is not you that breached, it's anyone you know about. So, if you are a counterparty and you become aware that maybe a bank processed a transaction they shouldn't have, you have an obligation to report that. If your client maybe accepted funds from a designated person, you have an obligation to report that. If you entered into a transaction with someone who became designated overnight and then you refunded their funds back to them, that's a breach, you have an obligation to report that.

With financial sanctions, these obligations to report are incredibly important. There is no obligation to report a trade sanctions violation. This is different. As I said, there isn't one single trade sanctions regulator, there are a number of them and it depends on which kind of trade sanction you are talking about as to whether or not there was a particular regulator involved, there will always be one, but there might be more than one. It also depends on how the breach arose. But, all of them have a voluntary disclosure mechanism. A good example is HMRC are the default regulator for quite a number of them and you can voluntarily disclose that you have committed a trade sanctions violation. But, you don't have to and that is a very important discussion to have with your legal advisors, with your company, with anyone who has been involved with that - whether or not there is benefit to disclosing that and then how it should be disclosed and how that disclosure should be managed. For example, if you have done your homework, you have identified how the breach arose and fixed it, you might want to consider making that disclosure of that violation. If, however, you are still in the process of working out how that happened so that you can fix it then you might want to hold off on making it, but there is a risk to that which is, if it is identified in the meantime, it is not a disclosure and you won't get any credit for it. So, these are very, very tricky conversations that you need to be having and hopefully no one will be in this situation where they need to be having these conversations, but it is something just to be aware of that financial sanctions you have a positive obligation to report as soon as reasonable practical after becoming aware of it, trade sanctions you need to have a very, very serious think about what you are going to report, who you are going to report it to and how it is going to be managed.

**Alexis** Thank you Alice. I've just got one last question on that last point where you said a person, knows, suspects or has reasonable cause to suspect there has been a sanctions breach by any person. Just focusing on reasonable cause, what are we talking about here?

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**Alice** It's basically quite a low threshold, it's the kind of threshold that lies on the floor and you can accidentally trip over it! "As soon as there is a suspicion of breach which is more than fanciful" and that's a really low threshold. So, it's very, very easy to reach that threshold and then suddenly think, "hah, I'm going to have to say something". But the other thing to remember is that - like I said earlier - that suspicion doesn't need to be about anyone that you actually deal with. It might be the counter-party, it might be an unrelated third-party such as a bank. That is where it is important to understand, "do you actually have a suspicion which is more than fanciful?" are you making some connections there, or is there a reasonable suspicion that something has happened which you think is a breach?

**Alexis** Well, thank you so much Alice, we have certainly learned a great deal about sanctions today. I can't quite believe how fast it has gone but, unfortunately, that is all we have got time for in this month's episode, but thank you again to Alice for today's podcast, for also being the founder of RPC's Taxing Matters, for all of her hard work, dedication and good humour over the last two years and for being a truly excellent host - and you will certainly be missed by all of us. I hope that you will come back again as a guest in the future, that would be fabulous. You can contact Alice on [alice.kemp@rpc.co.uk](mailto:alice.kemp@rpc.co.uk).

As ever a big thank you goes to Insighter Productions and Andrew Waterson for the production music and sound editing of this episode.

If you like Taxing Matters why not try RPC's other podcast offering, Insurance Covered, which looks at the inner works of the insurance industry, hosted by the brilliant Peter Mansfield and is available on Apple podcasts, Spotify and our website. If you liked this episode please take a moment to rate, review and subscribe - and remember to tell a colleague about us. Thank you all for listening and talk to you all again soon!

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