



New corporate criminal offence

Failure to prevent the facilitation of tax evasion

Background

The Criminal Finances Act 2017, which received Royal Assent on 27 April 2017, introduces new strict liability corporate criminal offences of failure to prevent criminal facilitation of tax evasion. The legislation will come into force on 30 September 2017.

The aim of the legislation is to require corporates to put in place reasonable procedures to prevent those providing services for, or on its behalf, from dishonestly and deliberately facilitating tax evasion.

Tax evasion and its facilitation are already criminal offences, however, the new corporate offences aim to overcome the difficulty often encountered by prosecuting authorities in attributing criminal liability to relevant bodies for the criminal acts of employees, agents or those that provide services for, or on their behalf.

Only a “relevant body” can commit the new offences. This is defined as “a body corporate or a partnership”, wherever incorporated or formed. The offences therefore apply to companies and partnerships (including LLPs).

What are the new offences?

The new legislation creates two new offences. The first offence relates to the evasion of UK tax and the second to the evasion of foreign tax.

There are three stages that apply to both offences:

1 Evasion

STAGE 1

The criminal evasion by a taxpayer (either an individual or a legal entity) under existing law.

2 Facilitation

STAGE 2

The criminal facilitation of the tax evasion by an associated person of the relevant body who is acting in that capacity.

3 Failed prevention

STAGE 3

The relevant body failed to prevent a person associated with it from committing the criminal facilitation act.

Any comments or queries?

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A relevant body can only commit the new offences if a person associated with it criminally (deliberately and dishonestly) facilitates a tax evasion offence. A person is “associated” with a relevant body if that person (an individual or corporate body) performs services for or on behalf of the relevant body.

The facilitation comprises being knowingly concerned in, or taking steps with a view to, the fraudulent tax evasion of another, as well as aiding, abetting, counselling or procuring another person’s offence of tax evasion. However, the associated person does not commit a tax evasion offence when they inadvertently, or even negligently, facilitate another’s tax evasion.

The statutory defence: reasonable prevention procedures

There is a complete defence to the offences for a relevant body if:

- it has in place reasonable preventative procedures as it was reasonable in all circumstances to expect it to have, or
- it was not reasonable, in all the circumstances, to expect it to have any preventative procedures in place.

The offence is modelled on the section 7 of the Bribery Act 2010 offence of corporate failure to prevent bribery and the statutory defence is similar to the equivalent defence of “adequate procedures to prevent” bribery, contained in the Bribery Act 2010.

HMRC has published draft guidance in relation to the new offences. The reasonable procedures should be formulated using six guiding principles.

1 RISK ASSESSMENT

The relevant body should assess the nature and extent of its exposure to the risk of those who act for or on its behalf engaging in activity during the course of business to criminally facilitate tax evasion. The risk assessment is key to the other guiding principles which need to be evaluated based on the results of the analysis of risk.

2 PROPORTIONALITY OF RISK BASED PREVENTATIVE PROCEDURES

To be “reasonable”, prevention procedures should be proportionate to the risks the relevant body faces of persons associated with it committing tax evasion facilitation offences. This will depend on the nature, scale and complexity of the relevant body’s activities.

3 TOP LEVEL COMMITMENT

Senior management of a relevant body should be committed to preventing persons associated with it from engaging in the criminal facilitation of tax evasion.

4 DUE DILIGENCE

The relevant body should apply due diligence procedures, taking an appropriate and risk based approach.

5 COMMUNICATION (INCLUDING TRAINING)

The relevant body should ensure that its prevention policies and procedures are communicated, embedded and understood throughout the organisation, through internal and external communication, including training.

6 MONITORING AND REVIEW

The relevant body should monitor and review its prevention procedures and make improvements where necessary.

Action to be taken

All relevant bodies should be taking action to ensure they are aware of and have control over how their associated persons operate in order to reduce the risk of exposure to the new offences.

Conducting a risk assessment is central to putting in place reasonable preventative procedures so that if necessary the above defence might be relied upon. Relevant bodies need to conduct a thorough risk assessment of their 'associated persons' and consider whether such persons have a motive, the opportunity and the means to facilitate tax evasion offences and if they do, appropriate procedures should be implemented.

The procedures should be documented so that an audit trail can be provided to support any policy decisions regarding the implementation of new procedures to reduce the risk of exposure to the new offences.

Any failure to implement reasonable preventative procedures may leave the relevant body exposed to criminal prosecution in the event an associated person facilitates tax evasion.

The Government has acknowledged that the reasonableness of prevention procedures will change as time passes. What is reasonable on the first day the new offences come into force will not necessarily be the same as what is reasonable when the offence has been in effect for a number of years.

What are the consequences of non-compliance?

The penalties for these new offences include an unlimited financial penalty and/or ancillary orders such as confiscation orders or serious crime prevention orders. Non-compliance will result in a criminal investigation by HMRC with any prosecutions being brought by the Crown Prosecution Service (CPS), whilst the foreign tax offence will be investigated by the Serious Fraud Office (SFO) or National Crime Agency and prosecutions will be brought by either the SFO or CPS. Aside from the implications of a prosecution, or resulting regulatory action, the risk of adverse publicity could adversely impact on the profitability of the business concerned.