

The Corporate Offence of Failure to Prevent Facilitation of Tax Evasion

On 30 September 2017, a new corporate offence came into force aimed at businesses that fail to prevent the facilitation of tax evasion. The new rules do not change the scope of what constitutes tax evasion, but puts a requirement on businesses to put in place various preventative procedures. In this blog, we will walk you through the new offence, the defences available to businesses and the prevention procedures that you should be putting in place.

Overview

The relevant legislation is contained in Part 3 of the Criminal Finances Act 2017 (**CFA 17**). The legislation applies to incorporated companies and partnerships (hereinafter referred to as an **Entity**). If found guilty of an offence under Part 3 CFA 17, an Entity will:

- receive a fine (there is no maximum fine specified in CFA 17) paid out of the Entity's assets; and
- could be subject to an ancillary order (e.g. confiscation order if a profit was made due to the criminal activity).

The Offence

The new offence will be committed where an Entity fails to prevent an Associated Person criminally facilitating tax evasion, regardless of whether the tax evaded is owed in the UK or in a foreign jurisdiction.

- **Associated Person** – an employee, agent or other person who performs services for/on behalf of an Entity and who is acting in that capacity. An Associated Person can be an individual or an incorporated body.

UK Tax Evasion Facilitation Offence

- Stage 1: For the offence to be committed there must be a criminal offence at the level of the taxpayer.
- Stage 2: There must be criminal facilitation of the taxpayer evasion by an Associated Person. The Associated Person must deliberately and dishonestly take action to facilitate taxpayer-level evasion. If the Associated Person accidentally, ignorantly or even negligently facilitated tax evasion, the offence is not committed by the Entity.
- Stage 3: The offence is a strict liability offence. As such, if Stages 1 and 2 are committed, the Entity will have committed the new offence unless it can show it has put in place reasonable preventative procedures.

Foreign Tax Evasion Facilitation Offence

- The Foreign Tax Evasion Facilitation Offence operates in the same way as the UK offence (i.e. Stages 1-3 above must be satisfied).

- However, the foreign offence is narrower in that the Entity must have a UK nexus and there is dual criminality.
 - UK nexus includes an Entity that is incorporated in the UK, carrying on a business in the UK or has an Associated Person located in the UK at the time of the offence.
 - Dual criminality means that the overseas jurisdiction must have an equivalent tax evasion offence at the taxpayer level and an equivalent offence covering Associated Person's criminal act of facilitating tax evasion.

Defences

It is a defence to the offence if the Entity can prove that, when the tax evasion facilitation offence was committed:

- (a) it had put in place prevention procedures (to prevent an Associated Person from facilitation tax evasion offences) that were reasonable in all the circumstances; **or**
- (b) it was not reasonable in all the circumstances to expect the Entity to have such procedures in place.

An Entity will give evidence of either (a) or (b) above to the body investigating it and, if litigation is pursued, will forward the defence at trial.

The sections below, 'Government Guidance' and 'Recommended Approach', set out the ways in which an Entity can put in place reasonable prevention procedures to support defence (a) above.

Government Guidance

The [Government guidance](#) sets out six principles that it considers should inform an Entity's prevention procedures, including:

- risk assessment;
- proportionality of risk-based prevention procedures;
- top level commitment;
- due diligence;
- communication (including training); and
- monitoring and review.

Recommended Approach

The following approach is based on the above six principles and should be adopted by the Entity to ensure that no Associated Person engages in tax evasion facilitation offences.

1. Risk Assessment

An Entity should undertake a risk assessment. This is to assess the nature and extent of the Entity's exposure to the risk of an Associated Person criminally facilitating tax evasion offences and how this risk might be managed.

The following should be considered, roughly in this order:

- whether the Associated Person has the motive, opportunity and means to criminally facilitate tax evasion offences;
- the size of the Entity, the nature and complexity of its business;
- internal risk – e.g. risk high if there are deficiencies in employee training or where company policy on tax evasion is not clear;
- customer risk – e.g. lower risk where the customer is a regulated body;
- country risk – e.g. whether it prescribes to the CRS, OECD tax transparency score;
- sectoral risk; and
- transaction risk.

Risk assessments should be documented and kept under review. It is recommended that one be carried out every three months.

2. Prevention Procedure

To be reasonable, an Entity's prevention procedures need to be proportionate to the risk of an Associated Person committing tax evasion facilitation offences. Once implemented, their effectiveness needs to be monitored.

Obviously identifiable risks could be dealt with in the following manner:

- To reduce Associated Person's opportunity to facilitate tax evasion, their work should be subject to scrutiny and review by a Partner. As a result the detection of tax evasion on behalf of an Associated Person would be very likely.
- To reduce Associated Person's motive to facilitate tax evasion, the Entity should clearly set out the consequences of doing so in its written policy (e.g. termination of employment).
- To reduce customer risk, the Entity's due diligence and client take on procedures should be reviewed and be compliant with HMRC's Anti-Money Laundering Regulations. Client identification (e.g. passport and proof of address) must be provided and source of funds should be determined. For the avoidance of doubt, the legislation does not hold an Entity to account for the crimes of their customers, nor does it require them to prevent their customers from committing tax evasion.
- Prevention tactics need to be considered in relation to the other risks that are identified during the Risk Assessment. These prevention tactics will depend upon what other risks are identified during the assessment. For example, if it is identified that employee A has a history of inadvertently promoting tax evasion (which is spotted by a senior employee and subsequently stopped) then a prevention tactic will be to provide employee A with more rigorous training and supervision in the future.

The Entity's prevention procedure needs proper formulation following a thorough risk assessment. The following should be a part of that procedure:

- Tax evasion-specific training so that an Associated Person has the skills to identify tax evasion and know what procedures to follow if this occurs.

- Clear procedures to report wrongdoing, questions or concerns by an Associated Person (e.g. identify management personnel that employees should report to).
- Set out in writing and circulate the Entity's policy to combat tax evasion, including:
 - zero tolerance approach;
 - commitment to compliance over profits;
 - what the consequence of facilitating tax evasion is;
 - set out how and who will monitor/assess risk; and
 - who is responsible for disciplinary procedures.
- Incorporate the Entity's zero tolerance for tax evasion policy in the Letter of Engagement and employment contracts.
- Conduct a three month review of the tax evasion policy based on ongoing monitoring.
- Provide internal feedback every three months on any risks Associated Person have encountered.

If you have any questions concerning these new rules please contact Rozi Ellis on +44 207 534 7180 or rozi@milestonetax.com