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# Failure to Prevent the Facilitation of Tax Evasion: New United Kingdom Corporate Criminal Offence

Proskauer

Article By
Robert Gaut
Stephen Pevsner
Catherine Sear
Proskauer Rose LLP
Proskauer Tax Talks

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**Background**

As mentioned in our July 2017 edition of UK Tax Round Up, the UK has enacted a new corporate criminal offence of failing to prevent the facilitation of tax evasion. The law comes into effect on 30th September 2017, and businesses should ensure that they have considered its impact before then. A risk assessment could be required to be carried out before 30th September, and applicable policies and prevention measures may need to be considered. The legislation in fact introduced two separate offences: failure to prevent the facilitation of UK tax evasion (the "UK Offence") and failure to prevent the facilitation of non-UK tax evasion (the "Foreign Offence").

Importantly, there are no territorial limits to the UK Offence – it has unlimited extra-territorial effect. The Foreign Offence requires a UK connection.

Any business successfully prosecuted for the new offences faces unlimited fines and the inevitable regulatory and reputational damage that would flow from a conviction.

## Scope

All incorporated bodies (companies) and partnerships, including LLPs, are within scope as “relevant bodies”.

The UK Offence can be committed by any relevant body worldwide. The Foreign Offence requires the relevant body to be a UK company or partnership, or a non-UK company or partnership carrying on business in the UK, or for any of the facilitation of tax evasion to take place in the UK.

The scope of the offence is limited to cases where there has been evasion of tax. Much recent commentary on international tax has blurred the distinction between avoidance and evasion of tax. Here, the law is concerned with evasion – cheating the public revenue or fraudulently evading tax. The UK Offence applies to tax fraud offences under UK law. The Foreign Offence requires an element of “dual criminality” to be in place – it will be committed where the relevant acts that have been facilitated would constitute a UK tax evasion offence and the relevant overseas jurisdiction has similar laws to the UK in place as regards the evasion itself and the facilitation.

For the offence to apply, one or more of the relevant body’s “associated persons” must have committed a “tax evasion facilitation offence”, and the statutory defence (referred to below) not be available. Associated persons include all the relevant body’s employees and partners acting on its behalf, and also its agents and even its sub-contractors, in some circumstances.

Facilitation requires a level of knowledge by the relevant associated person of the underlying tax evasion. The law defines a tax evasion facilitation offence as (a) being knowingly concerned in or taking steps with a view to the fraudulent evasion of tax by another person or (b) aiding, abetting, counselling or procuring the commission of a tax evasion offence. Legitimate advice and services given in good faith that are misused by clients and third parties should not be in scope.

To summarise, there are three stages to the offences:

1. The criminal evasion of tax (with the “dual criminality” overlay for the Foreign Offence referred to above)

2. The criminal facilitation of this offence by an associated person of the relevant body (again with the “dual criminality” overlay for the Foreign Offence)

3. The failure by the relevant body to prevent its associated person from committing that facilitation – in other words, the statutory defence described below not being available. If there has been facilitation of tax evasion by an associated person of the relevant body, the offence is strict liability. This means that no actual intent or subjective awareness on the part of the relevant body needs to be proved – there will be criminal liability if the statutory defence is not available.

## Defence

The only statutory defence available is that the relevant body had in place reasonable prevention measures or that there were reasonable grounds for not having such procedures in place. Guidance issued in draft by HM Revenue & Customs states that those measures should be guided by six core principles:

1. Risk assessment
2. Proportionality of risk-based prevention procedures
3. Top level commitment
4. Due diligence
5. Communication (including training)
6. Monitoring and review

## Action

All corporate organisations and partnerships, particularly those based in the UK or carrying on business here, should carry out as a priority an assessment of how this new legislation might apply to them and, in particular, the risk of facilitation of UK or, if relevant, non-UK tax evasion occurring in their business. Those overseas businesses with no interaction with the UK may conclude that it is reasonable not to have preventive measures in place, but that will depend on the facts in each case.

The results of this risk assessment may well, however, lead to changes to policies and procedures. Affected businesses should consider training on the new offence for all relevant staff, the policies around work intake and rules around reporting suspected incidents of tax evasion by third parties. It will also be critical that these steps be clearly documented, as will the top level commitment by senior management to prevent facilitation of tax evasion.



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