

## HMRC gets strict on evasion

12/08/2015

**Tax analysis: What is the significance of HMRC's latest raft of consultations around tax evasion? James Bullock, a partner at Pinsent Masons LLP, and member of the Lexis®PSL Tax consulting editorial board, explores the proposals and explains how HMRC's approach will mean that all businesses will have to be live to the risk of facilitating evasion.**

### Original news

*The government announced four consultations as part of its publication 'Tackling Evasion and Avoidance'. These take forward HMRC's strategy for tackling offshore evasion, 'No Safe Havens'. An update on this strategy was published in April 2014.*

*The four consultations are:*

- o *Tackling offshore tax evasion: Strengthening civil deterrents for offshore evaders (see LNB News 16/07/2015 152)*
- o *Tackling offshore tax evasion: Civil sanctions for enablers of offshore evasion (see LNB News 16/07/2015 157)*
- o *Tackling offshore tax evasion: A new corporate criminal offence of failure to prevent the facilitation of evasion (see LNB News 16/07/2015 159)*
- o *Tackling offshore tax evasion: A new criminal offence for offshore evaders (see LNB News 16/07/2015 149)*

### What is the scope of the proposed offences?

The proposed new corporate offence of failure to prevent the facilitation of evasion is a Bribery Act 2010 (BA 2010)-style offence aimed at businesses whose 'agents' enable others to evade tax. The 'agents' will have to intend to facilitate evasion, but the employer will not have to know what they are up to. It is similar to offences under BA 2010 in that it will be a defence for the business to show that it has taken reasonable steps to put in place adequate compliance procedures to prevent the criminal facilitation of tax evasion by their agents. It will apply to all taxes. 'Agents' for these purposes means people who act on behalf of the business. This would include employees but could also include others such as contractors and possibly intermediaries to whom customers are referred.

Financial penalties are also being considered for those who deliberately 'enable' offshore tax evasion by others--with the maximum penalty proposed as the greater of the greater of £1000 and 100% of the tax evaded. The penalty would be applied in respect of each individual whose evasion they have facilitated and the name of any bank or other business caught by this measure may be published.

The proposed new strict liability offence of 'offshore tax evasion' will apply if offshore income or gains are found not to have been disclosed by individuals to HMRC on a tax return, whether as a result of failing to:

- o notify chargeability to tax
- o file a tax return, or
- o include the assets on a return which is filed

The strict liability nature of the offence means that HMRC will not need to prove an intention to evade tax--the mere fact that income or gains are not disclosed without reasonable excuse will be sufficient to trigger the offence and a possible criminal prosecution. Those committing the offence could face a prison sentence of up to six months. There will be a de minimis limit so that the offence will only apply if the potentially lost revenue exceeds £5,000 (and the offence will not apply to trustees, executors or administrators).

Higher financial penalties are also proposed for offshore tax evaders. The options proposed include:

- o a higher minimum penalty, a penalty of 10% of the value of an asset involved in offshore evasion, and/or
- o in exceptional cases, a penalty which could be awarded by the Upper Tribunal equivalent to 100% of the value of the assets linked to the offshore evasion

### Why they are being introduced?

The government wants to stop banks and other businesses from helping UK residents to evade tax and it wants to make sure that they will not help individuals to get round tax transparency measures. These will include the automatic exchange of tax information under the Common Reporting Standard (CRS), which will be taking place for early adopters from September 2017. Under current law it is difficult to make employers criminally liable for the actions of their employees unless it can be shown that senior management are aware of what is going on. The corporate offence also fits with the government's wider intention to introduce a new criminal offence of failure to prevent economic crime. If the offence is introduced, UK corporates will no longer be able to turn a blind eye to the actions of their group employees or of intermediaries to whom they refer clients.

Despite several disclosure opportunities for people with undeclared assets abroad, HMRC believes there is still a rump of offshore evaders who have stubbornly refused to come forward. In 2016, HMRC will begin to get the first automatic exchanges of information about UK residents with offshore accounts in the Crown Dependencies and Overseas Territories. In 2017, disclosures will begin to flow in under the CRS. In advance of that, there will be one final disclosure opportunity for tax evaders to come forward voluntarily. The government wants to be able to prosecute anyone who fails to come clean and regularise their tax position. However, high profile cases involving celebrities have illustrated the difficulties under the current regime of getting criminal convictions where offshore tax evasion is concerned. At present the prosecution has to persuade a jury that there is no reasonable doubt that the individual intended to evade tax. This can be notoriously difficult--especially, for example, where a defendant can show that they have taken advice. The strict liability offence should make it much easier for HMRC to bring criminal prosecutions, where offshore evasion is concerned, because it will no longer need to prove any intent to evade tax.

### How would the corporate offence work in practice?

The consultation document sets out five broad areas where corporations could commit the new offence of failing to prevent the facilitation of tax evasion. These are where the corporation or its staff:

- o arranges access and introductions to others who facilitate evasion
- o provides planning and advice on jurisdictions, investments and structures which will enable assets to be hidden--especially if there is an attempt to frustrate automatic exchange of information under CRS
- o delivers infrastructure by setting up companies, trusts and other vehicles to hide beneficial ownership, opens bank accounts or provides legal services and documentation which underpin the structures used in the evasion
- o maintains the infrastructure by providing professional trustee or company director services including nominee services, or providing virtual offices, IT structures, legal services and documentation which obscures the true nature of the arrangements, and
- o provides financial assistance by helping to move money out of the UK or to keep it hidden by providing banking services and platforms, client accounts, escrow services and moving money through financial instruments and currency conversions

Prosecutions for this offence are expected to be rare. The intention is to change behaviour by stopping legitimate businesses from helping tax evaders by turning a blind eye to what their employees or agents are doing. Businesses will clearly want to do whatever they can do to avoid the severe reputational damage that would result from a prosecution or even an allegation that they had committed the offence (which they would then have to fight hard to disprove).

The measure will be particularly relevant to banks, trust companies and professional services firms. These businesses will already be obliged to comply with anti-money laundering rules--which if properly applied should already prevent much of this behaviour. The offence may therefore be most relevant to the offshore locations which do not currently recognise tax evasion as a predicate offence under their anti-money laundering rules.

However, it does not appear that the offence will be limited just to banks, trust companies and the like. It appears that it could have implications for all businesses. Also, although billed as a measure to tackle offshore evasion, UK evasion of UK tax appears to be covered. The key issue for all businesses will be to ensure they train staff so that they are aware that they must not facilitate tax evasion and that they put suitable policies and procedures in place. Without these measures businesses run the risk of being exposed to criminal liability as a result of the actions of just one rogue employee.

Businesses will also need to look carefully at their use of contractors and at their referral procedures. They will also need to ensure that invoicing arrangements stand up to scrutiny.

### **Could there be any potential pitfalls or problems in enforcing these new offences?**

The corporate offence covers those situated anywhere in the world who are facilitating the evasion of UK tax and for those based in the UK covers the facilitation of evasion of foreign as well as UK tax. It is not clear how it will be enforced against those based abroad, but overseas banks and trust companies will probably feel obliged to comply to prevent the reputational damage that could result from non-compliance. It is also not clear how the penalties will be enforced in the case of those located abroad.

The very wide ambit of the offence means that in the case of UK businesses, it catches those facilitating the evasion of non-UK tax. It is not clear who will police this foreign tax aspect.

There is a defence to the strict liability offence if the individual has a reasonable excuse for failing to notify chargeability or deliver a return or, in the case of an incorrect return, the individual can show they took reasonable care to ensure that the return was accurate. Many of those who responded to the original consultation suggested a defence of having sought and followed appropriate professional advice. However, HMRC rejected this saying a defence of reasonable care is a sufficient safeguard. HMRC takes a strict line on what constitutes a reasonable excuse or reasonable care, in the context of existing legislation. It is clear that they will continue to do so as the consultation document warns that:

'HMRC will continue to challenge what it sees as inappropriate claims to reasonable care or excuse, when the facts as it sees them do not support those claims.'

In practice, therefore, this defence is unlikely to be available to many.

### **When will the offences come into force?**

This is the second consultation on the strict liability offence and the document includes draft legislation. We are promised a response to this consultation in the Autumn Statement--and the timetable looks realistic for the legislation to go into the Finance Act 2016 and come into force from a date to be appointed by regulations. That also fits with the government's intention to get the legislation on the statute book before the first exchanges of information in September 2016.

The consultation document states that the strict liability offence will not be retrospective. However, it will apply in relation to tax years which have ended at the time the offence comes into force because it applies to returns 'which the statutory time limits allow to still be amended at that time'. For example, if the offence were to come into force in summer 2016, incorrect returns for 2014/15 as well as 2015/16 could therefore trigger the offence.

It is also suggested that we will hear about the outcome to the consultation on the corporate offence in the Autumn Statement. However, as this is only the first consultation on the proposal, producing draft legislation by December (when draft Finance Bill clauses are usually published) may prove challenging. So this may be one we can expect in the Finance Act 2017, rather than 2016.

*Interviewed by David Bowden.*

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