ALERT MEMORANDUM

UK Corporate Criminal Offences of Failing to Prevent Facilitation of Tax Evasion Come into Force

October 16, 2017

On September 30, 2017, two new criminal offences came into force under the UK's Criminal Finances Act 2017 ("CFA"). The offences are intended to make it easier for the UK to prosecute corporations and partnerships for the role they play in the facilitation of tax evasion.

The new offences are notable not only for criminalizing omissions rather than positive actions, but also for their wide territorial scope. Their reach can extend in certain circumstances to organizations outside the UK and to non-UK tax evasion.

In practice, the CFA may require UK and non-UK businesses to put in place systems designed to prevent employees, and others who act for or on behalf of the business, from facilitating tax evasion.

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The full text of the CFA can be accessed via this link. The new offences are in Part 3.

The full text of the HM Revenue & Customs guidance on the new offences can be accessed via this link.

Background

In recent years, the facilitation of tax evasion has given rise to a number of international scandals – most notably, the "Panama Papers" leak. In certain cases, individuals have been prosecuted for their role in assisting others to evade tax. However, the UK government has been frustrated by the difficulties in punishing organizations for their role in such facilitation, which requires the involvement or awareness of the highest level of the organization's management.

As a result, two new UK offences have been introduced to attribute criminal liability to organizations which do not take active steps to prevent such facilitation.

New offences

From September 30, 2017, "relevant bodies", which include bodies corporate and partnerships (wherever incorporated), will be criminally liable for the failure to prevent their "associated persons" from facilitating tax evasion. Associated persons include employees, agents and other legal or individual persons who perform services for or on behalf of the relevant body.

The concept of a person who performs services for or on behalf of an organization is intended to be broad in scope and could, for example, include sub-contractors. However, relevant bodies will not be liable for the actions of associated persons when the associated persons are acting in their personal capacities.

Firms which provide financial, legal or accountancy services are expected to be most affected by the new offences, but the law is not limited to them and organizations in other industries are also likely to be impacted.

If convicted, the relevant body could be subject to unlimited financial penalties and ancillary orders such as confiscation orders. Criminalization also means that the organization may be prevented from tendering for government contracts, may be required to disclose the conviction to any regulators and would likely suffer reputational damage.

Territorial scope

The first offence introduced by the CFA (the "UK offence") applies when evasion of UK tax is facilitated, irrespective of where the facilitation takes place. The second offence (the "foreign offence") applies (a) where evasion of non-UK tax is facilitated by an associated person of a relevant body that is incorporated, formed or carrying on business in the UK, or (b) where any conduct constituting part of a non-UK tax evasion facilitation offence takes place in the UK.

Elements of the offence

To fall foul of either offence there must be:

1. underlying criminal tax evasion (rather than mere tax avoidance); and
2. criminal facilitation of that tax evasion. In broad terms, this means that the associated person must: deliberately and dishonestly facilitate the tax evasion; be knowingly concerned in, or take steps with a view to, another person evading tax; or aid and abet another person evading tax. An associated person will not *criminally* facilitate tax evasion by unwittingly, or even negligently, assisting in the facilitation of tax evasion. However, criminal facilitation can occur where a person knows or is willfully blind to their role in tax evasion.

In the case of the foreign offence, there must also be "dual criminality", meaning that the behavior of the evader and the facilitator must be a crime in both the relevant foreign jurisdiction and the UK.

The new offences are strict liability offences, meaning that once the above elements are proven, the relevant body will be guilty of an offence (irrespective of the degree of knowledge or involvement of management) unless it can rely on the sole defense available.

Defense of "reasonable prevention procedures"

Relevant bodies can avoid criminal liability if they can prove that they have "reasonable prevention procedures" in place to prevent the facilitation of tax

evasion or that it was not reasonable to expect them to have such procedures in place.

Where the elements of the offences have been proven, it will be for the relevant body to establish that the defense applies. Accordingly, relevant bodies should ensure that they have properly documented their procedures.

Guidance has been published by HM Revenue & Customs ("HMRC") setting out six key principles which underscore, and are expected to inform, relevant bodies' procedures:

1. risk assessment (to assess the nature of the body's exposure);
2. proportionality of risk-based prevention measures;
3. top-level commitment (from the board of directors or senior management) to preventing associated persons engaging in criminal facilitation;
4. due diligence on associated persons;
5. communication with associated persons (including training); and
6. monitoring and review of the effectiveness of prevention procedures.

HMRC recognize that organizations should not be required to actually prevent the facilitation occurring. Rather, relevant bodies should take such prevention procedures as are proportionate to the risks faced and the degree of control which they have over particular associated persons.

Practical steps

The UK government considers that a relevant body cannot come to a conclusion as to what constitutes reasonable and proportionate prevention measures without having first conducted a risk assessment. This will likely involve organizations identifying their associated persons and then "sitting at their desk" to test whether they have the motive, the opportunity and the means to facilitate tax evasion (whether in the UK or outside the UK). It would also involve a process of identifying and prioritizing risks associated with the size, activities, customers and markets of the business.

HMRC expects "rapid implementation focusing on major risks and priorities" and has noted that by September 30, 2017, it would expect relevant bodies to have conducted a risk assessment and to have a "clear timeframe and implantation plan". To the extent that potentially affected organizations have not yet taken such steps, they should do so as soon as possible.

As regards the specific measures to be implemented, there is no "one size fits all" safe harbor. Relevant bodies will need to determine what constitutes "reasonable prevention procedures" by reference to their particular risk profile. Potential steps may include:

- allocating appropriate resources to preventing the facilitation of tax evasion;
- developing clear policies, setting out: reporting lines where wrongdoing is suspected; protections for whistleblowers; and disciplinary procedures;
- introducing training programs for employees, including explanations as to what constitutes tax evasion and facilitation;
- putting enhanced due diligence protocols in place for employees, agents and service providers;
- updating employee contracts to address the relevant body's approach to tax evasion and employees' related obligations; and
- updating contracts with third parties to include confirmations and undertakings regarding the third party's approach to tax evasion, and the prevention policies it has in place. (Indeed, some organizations may in turn find themselves being subject to due diligence from clients or customers, or being asked to provide undertakings.)

Since relevant bodies are not limited to UK companies and partnerships, this means that non-UK bodies corporate and partnerships should also consider these measures – especially if they or their associated persons carry on business or otherwise do work in the UK.

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