

Legal Alert

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New corporate criminal offence: failure to prevent facilitation of tax evasion

Introduction

HMRC is on a mission to eradicate offshore tax evasion and revolutionise international tax transparency. Already the UK is party to a series of tax information exchange agreements with countries both within and outside the European Union.

Against this backdrop the Government is now legislating for a new criminal offence for corporations who fail to prevent the facilitation of tax evasion by persons associated with them (the "**Corporate Tax Offence**").

Here we explain what the offence is, how it is likely to affect you and what you should be doing now to prepare for it.

The Corporate Tax Offence

Status and effect

Following consultation in 2016, the offence has been included in the Criminal Finances Bill, and is expected to take effect on Royal Assent (which is likely to be in early autumn 2017, although it may be earlier). Companies, therefore, should start taking steps now to ensure that they are compliant by having the necessary procedures in place at the time the offence comes into force.

What is the offence?



Corporation

Corporation failed to take reasonable steps to prevent...



Associated Person

...criminal facilitation by natural or legal person associated with the corporation



Tax Evader

...of criminal tax evasion by a taxpayer under existing UK or overseas law

Under the Corporate Tax Offence, a body corporate or partnership will be criminally liable if it fails to take reasonable steps to prevent an associated person facilitating the commission of a UK tax evasion offence (or an overseas tax evasion offence that would amount to an offence if committed in the UK) by a taxpayer. A corporation guilty of the offence is liable to an unlimited fine.

Case Studies

Online Ltd enables domestic and foreign retailers to sell their products on its website. Online's employees do not check the retailer's VAT obligations even though the issue is discussed internally occasionally. HMRC later discovers that a number of retailers selling on Online's platform failed to account for VAT correctly.

Hi-Tech UK Ltd exports high-tech products across the world. Hi-Tech is aware that a couple of its key customers in Asia are able to on-sell Hi-Tech products very competitively in their local markets and there have been rumours that this is due to the companies' lack of compliance with their local tax obligations. Hi-Tech continues to sell to these companies.

Software Ltd supplies point of sale software which many restaurants use to keep track of all of the orders. Food Ltd ask its contact at Software Co to provide them with editing rights so that they can amend the orders recorded on any given day. Editing rights are reluctantly given by Software's employee. HMRC discovers that Food Ltd had been deleting orders from their sale system in order to declare lower profits.

Commodities Co imports goods into the UK which are subject to excise duty. Supply Co, which is quite new to the market, offers Commodities Co to supply certain goods at a significantly discounted price. After several months of profitable trading, Commodities Co discovers that Border Force seized a shipment of goods from Supply Co on the basis that Supply Co did not account for excise duty.

Who is an associated person?

An associated person is defined as any legal or natural person that performs services for or on behalf of the corporation, such as an employee, agent subsidiary, distributor and a joint venture. HMRC has issued draft guidance (which you can access [here](#)) which emphasises that contractual relationships are not relevant in establishing who is an associated person. Instead the definition is intended to have wide application based on the relevant facts.

What is criminal facilitation?

Criminal facilitation occurs if the associated person either: (i) is knowingly concerned in, or takes steps with a view to, the fraudulent evasion of tax by another person; or (ii) aids, abets, counsels or procures the commission of a tax evasion offence. The examples given in HMRC's guidance as to what would constitute facilitation include a broad category of activities, including setting up and maintaining bank accounts, providing bank services, and making introductions.

What is the territorial scope of the offence?

There are some nuances in terms of the geographic scope of the Corporate Tax Offence. Where an associated person facilitates the commission of a **UK** tax evasion offence, the corporation will be liable irrespective of where it was incorporated or formed. Where an associated person facilitates the commission of an **overseas** tax evasion offence, the corporation will be liable if : (i) it was incorporated or formed in the UK; (ii) it carries on a business (or part of a business) in the UK; or (iii) any part of the criminal facilitation occurred in the UK.

Are there any defences?

There are only two defences available. A corporation will have a defence if it had in place "reasonable" procedures designed to prevent its associated persons from committing tax evasion facilitation offences. HMRC's guidance provides 6 Guiding Principles to help determine whether procedures meet the test of reasonableness. They are:

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

All the surrounding circumstances will be considered for the purposes of assessing what is reasonable. For example, corporations operating in a more high-risk sector, such as financial services, will be required to have more robust procedures in place in order to meet the standard of reasonableness. The level of control or supervision a corporate has over an associated person will also be a key factor.



A corporation will also have a defence if it was not reasonable in the circumstances for the corporation to have procedures in place to seek to prevent the particular form of criminal facilitation. We expect this defence would rarely apply in practice.

Comparison between the UK Bribery Act 2010 and the Corporate Tax Offence

The Corporate Tax Offence is undoubtedly modelled on the Bribery Act 2010 ("**UKBA**"). However, there are some notable differences.

Whilst the UKBA offence provides for corporate criminal liability as a result of actions carried out by an associated person (i.e. bribery by an associated person), the Corporate Tax Offence provides for corporate criminal liability where an associated person facilitates an act by **another** (i.e. tax evasion by a taxpayer). The additional third party element makes the Corporate Tax Offence structurally and fundamentally different from the UKBA offence.

Under the UKBA, an associated person must intend to obtain a benefit for the corporation. Under the Corporate Tax Offence, however, the associated person need only perform services for or on behalf of the corporation; there is no requirement for the associated person to intend its facilitation to benefit the corporation in any way. This makes the Corporate Tax Offence broader in scope.

Finally, with regard to the defence language, the UKBA refers to "adequate procedures" whereas the Corporate Tax Offence refers to "reasonable procedures". Reasonableness is arguably a less stringent test than adequacy. Indeed, in its response to the initial consultation the Government stated that corporations are not expected to be able to stop every instance of non-compliance by its associated persons and that it intends to include specific provisions stating that a process that successfully detects and discloses wrongdoing is likely to be found reasonable.

How will this affect you and what can you do to prepare?

The Corporate Tax Offence can apply in any industry, as demonstrated by the case studies included in this alert. As there are only a few months until the expected commencement of the offence, it is important that corporations start taking steps now to ensure they are fully compliant. To this end, we recommend that corporations:

- first, conduct a **thorough risk assessment** to identify how the business might be exposed to the risk of committing the Corporate Tax Offence;
- secondly, corporations should **undertake a gap analysis of their current compliance policies and procedures** and consider how their terms need to be updated in light of the new offence;



- thirdly, members of the corporation, particularly those identified as associated persons for the purposes of the new offence, should **be trained appropriately**, and training procedures should be put in place now, perhaps as part of the anti-bribery and corruption training; and
- finally, corporations should ensure that appropriate **procedures are implemented and their success monitored**.

The new offence requires practical and strategic considerations that go beyond just tax principles. The combined expertise of our tax, compliance and criminal disputes teams means we can assist you in preparing for this new challenge in the most effective way.

We would be very happy to discuss your current approach to this new offence with you at any time.

www.bakermckenzie.com

For More Information



Piermario Porcheddu
Senior Associate, London
+ 44 20 7919 1488
piermario.porcheddu@bakermckenzie.com



Jennifer Revis
Of Counsel, London
+ 44 20 7919 1381
jennifer.revis@bakermckenzie.com



Charles Thomson
Partner, London
+ 44 20 7919 1879
charles.thomson@bakermckenzie.com

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