UK Offences of Failure to Prevent the Facilitation of Tax Evasion

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Introduction

The notion of failing to prevent an illegal activity has gained legal traction in recent years in the UK, most prominently with the offence of the failure of a commercial organisation to prevent bribery under the UK Bribery Act 2010, against which an “adequate prevention procedures” compliance defence exists. There are also two offences of failure to prevent the facilitation of tax evasion, under the UK Criminal Finances Act 2017, against which a “reasonable prevention procedures” compliance defence exists. This brief article highlights the issues concerning these two offences.

What are the two offences?

The two criminal offences are as follows:

- The offence of failing to prevent the facilitation of a UK tax evasion offence (“the UK tax evasion facilitation offence”); and,
- The offence of failing to prevent the facilitation of a foreign tax evasion offence (“the foreign tax evasion facilitation offence”).Both offences are subject to a “reasonable prevention procedures” defence, i.e. an organisation has the possibility of being able to prove that it has maintained reasonable procedures intended to prevent the facilitation of the underlying tax evasion offences.

Both offences have a common core structure (see further below) but for the foreign tax evasion facilitation offence there are additional requirements of so-called “dual criminality” (see further below).

Both offences are subject to a "reasonable preventive measures" defence, i.e. and organisation has the possibility of being able to prove that it has maintained reasonable procedures intended to prevent the facilitation of the underlying tax evasion offences.

Both offences came into force on 30 September 2017.

Who can commit the offences?

The UK tax evasion facilitation offence can be committed by any (corporate or partnership) organisation, i.e. irrespective of globally where it is incorporated or based.

The two offences can only be committed by a so-called “relevant body”, which is either a corporate body or partnership only – individuals cannot commit the offences.

The UK tax evasion facilitation offence can be committed by any (corporate or partnership) organisation, i.e. irrespective globally of where it is incorporated or based.

The foreign tax evasion facilitation offence can only be committed by an organisation that has a connection with the UK, namely:

- Either, it is a body incorporated, or partnership formed, within the UK;
- Or, it carries on business, or part of a business, within the UK;
- Or, through any conduct constituting part of the foreign tax evasion facilitation offence takes place in the UK.

What is the common core structure of the two offences?

The common core structure of the two offences is made up of three elements as follows:

- A taxpayer commits a criminal tax evasion offence. The taxpayer can be either an individual or an entity. Tax evasion means either “cheating the public revenue”, or “being knowingly concerned in” or “taking steps with a view to” the fraudulent evasion of any tax. Tax covers a wide variety of types of tax;
- A so-called “associated person” of the (corporate or partnership) organisation commits a criminal facilitation offence. Essentially the “associated person” must be involved in deliberate and dishonest conduct which amounts to a criminal offence in itself, to facilitate the taxpayer’s tax evasion; the “associated person” must also be acting in their capacity as an “associated person” of the (corporate or partnership) organisation. An “associated person” is wide in scope and includes individuals and corporate entities – employees and agents of an organisation are covered along with any other person who performs services for or on behalf of the organisation. “Facilitation” means “being knowingly concerned in” or “taking steps with a view to” or “aiding, abetting, counselling and procuring” tax evasion offences (a UK tax evasion offence for the purposes of the UK tax evasion facilitation offence, and a foreign tax evasion offence for the purposes of the foreign tax evasion facilitation offence). **“**Facilitation” through an “associated person’s” negligent, ignorant, or accidental conduct does *not* make the (corporate or partnership) organisation liable; and,
- The (corporate or partnership) organisation fails to prevent the “associated person” committing the (“associated person’s”) criminal facilitation offence.

What does “dual criminality” mean?

In addition to the condition that for the foreign tax evasion facilitation offence to be committed, an organisation must have a connection with the UK and there must also be so-called “dual criminality”. In effect this broadly means equivalence between both the taxpayer’s tax evasion offence and the “associated person” facilitator’s offence with regard to the UK and the foreign jurisdiction:

- For the taxpayer tax evasion offence: e.g. a French taxpayer evades French income tax (i.e. this is an offence in France) – income tax evasion is a criminal offence in the UK, so there is “dual criminality”;
- For the “associated person” facilitator’s offence: e.g. an “associated person” commits a French offence of aiding and abetting tax evasion – aiding and abetting income tax evasion is a criminal offence in the UK, so there is “dual criminality”.

This issue is viewed from the perspective of the UK, as it were. So, if, either the taxpayer’s evasion of a foreign tax does not exist under UK law, e.g. the foreign law tax is based on an individual’s hair colour the evasion of which is an offence under foreign law, or an “associated person’s” commission of a foreign facilitation offence cannot be committed under UK law, e.g. facilitation can be committed through negligence under foreign law, in either case there is no “dual criminality”.

What are “reasonable prevention procedures”?

If a (corporate or partnership) organisation has maintained “reasonable prevention procedures” intended to prevent the facilitation of the underlying tax evasion offences it will have a defence to the two offences. As can be imagined, much will turn on proving that “reasonable prevention procedures” were actually in place.

It is also a defence in relation to both offences that, when the offence was committed, “it was not reasonable in all the circumstances to expect [an organisation] to have any prevention procedures in place”. This may well be a tall order to meet.

The UK Criminal Finances Act 2017 does not set out what “reasonable prevention procedures” are or might be. Instead these are found in official UK HM Revenue & Customs guidance of 2017 entitled “Tackling tax evasion: Government guidance for the corporate offences of failure to prevent the criminal facilitation of tax evasion”, which is informed by the following six principles:

- Risk assessment;
- Proportionality of risk-based prevention procedures;
- Top-level commitment;

- Due diligence;
- Communication (including training); and,
- Monitoring and review.

As with all guidance it is only guidance, so following it is not a cast-iron guarantee for immunity from prosecution, especially if little more than a tick/check-box approach has been undertaken.

What are the penalties?

Both of the above offences are punishable by way of an unlimited fine in England and Wales – convicted organisations may also be subjected to certain court orders including confiscation orders.

Can an organisation self-report?

Yes. If an organisation suspects that one of the two offences may have taken place it may wish to undertake an internal investigation and (voluntarily) self-report; self-reporting can be done via an online form. The official UK HM Revenue & Customs guidance states that "In order to encourage relevant bodies to disclose wrongdoing, timely self-reporting will be viewed as an indicator that a relevant body has reasonable procedures in place" (so an organisation may have a defence). Self-reporting is also very relevant with regard to an organisation trying to agree a Deferred Prosecution Agreement with the relevant prosecuting authority, which may lead to deferral of prosecution under which the organisation agrees to fulfil certain conditions, under the supervision and approval of a judge.

What are the takeaways?

Organisations might want to consider doing the following:

- Having a compliance plan and scoping out how to address the issue of failure to prevent the facilitation of tax evasion;
- Putting in place "reasonable prevention procedures" taking a tailored risk-based approach according to the size, nature and complexity of the business;
- Putting in place policies and procedures, including for whistleblowing;
- Getting the Board on board; and,
- Training staff.

We report about compliance issues here https://www.corderycompliance.com/news/.

The UK Criminal Finances Act 2017 can be found here https://www.legislation.gov.uk/ukpga/2017/22/contents/enacted and the official UK guidance about the two offences can be found here https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/672231/Tackling-tax-evasion-corporate-offences.pdf.

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