New UK Corporate Offences of Failure to Prevent the Facilitation of Tax Evasion

Overview

Two new corporate criminal offences of failure to prevent the facilitation of tax evasion (the “FTP offences”) under Criminal Finances Act 2017 (the “Act”) will come into force on 30 September 2017. The new FTP offences are being introduced to encourage companies to put in place, and to communicate, good corporate governance on preventing tax evasion.

The new offences have wide extra-territorial application and impose criminal liability on a company, whether established in the UK or anywhere in the world, if it has failed to prevent the criminal facilitation of tax evasion by a “person associated” with it. A “person associated” with a company, is, in essence, someone who provides services for, or on behalf of, the company (e.g. an employee, agent, contractor or supplier). The new FTP offences apply to UK and foreign tax evasion. The new FTP offences apply not only to companies but also to other UK and foreign corporate bodies, including partnerships and professional services firms.

A company will have a defence to liability if it can prove that, at the time when the criminal facilitation of tax evasion by a “person associated” with it occurred, the company had in place “such prevention procedures as it was reasonable in all the circumstances to expect” to prevent a “person associated” with it from committing the facilitation offence, or it was not reasonable in all the circumstances to expect the company to have any prevention procedures in place (the “reasonable prevention procedures” defence). Unless a company can establish the defence, the company will be guilty of the new FTP offences and could be liable to an unlimited fine. If the company found guilty of an FTP offence is a regulated business, there may be regulatory consequences of the prosecution such as, for instance, a loss of a licence to carry on the relevant business. In addition, the prosecution may result in adverse publicity, which may adversely affect the company’s reputation and its business.

The new FTP offences will require UK and foreign companies to review their businesses and supply chains for a risk of potential UK and foreign tax evasion, to conduct due diligence in respect of external business with “persons associated” with them and to update their compliance policies and procedures by 30 September 2017.
Scope of the FTP offences

The Act introduces two separate FTP offences: (i) failure to prevent the facilitation of “UK” tax evasion offences (the “UK FTP offence”) and (ii) failure to prevent the facilitation of “foreign” tax evasion offences (the “Foreign FTP offence”). A company can only commit the FTP offences if a “person associated” with it criminally facilitates a tax evasion offence (i.e. deliberate and dishonest action by a “person associated” with the company is required).

Before a company can be found guilty of either FTP offence, the prosecution will have to prove that two underlying offences have been committed:

- **Stage 1**: a tax evasion offence must have been committed by a taxpayer;
- **Stage 2**: a “person associated” with the company must have criminally facilitated that tax evasion; and
- **Stage 3**: Only if the two underlying offences at Stages 1 and 2 have been committed, an offence of failure by the company to prevent a person associated with it from committing the criminal facilitation of the tax evasion can take place.

**UK FTP offence**

- **At Stage 1**: A taxpayer must have fraudulently evaded UK tax. (The taxpayer can be an individual or a legal entity.) The “UK tax evasion offence” covers the offences of: (i) cheating the public revenue, or (ii) being knowingly concerned in, or taking steps with a view to, the fraudulent evasion of a tax. This encompasses all common law and statutory tax evasion offences involving dishonesty, and covers all UK taxes.

- **At Stage 2**: A "person associated" with the company must have criminally facilitated that taxpayer's tax evasion. The “UK tax evasion facilitation offence” is widely defined in the Act to include: (a) being knowingly concerned in, or in taking steps with a view to, the fraudulent evasion of a tax by another person; and (b) aiding, abetting, counselling or procuring the commission of a UK tax evasion offence. This offence requires a “person associated” with the company to intend to facilitate the UK tax evasion.

- **At Stage 3**: If the two underlying offences at Stage 1 and 2 have been committed and the company has failed to prevent a “person associated” with it from committing the criminal facilitation of the tax evasion, the
company will be guilty of the UK FTP offence unless it can successfully establish the “reasonable prevention procedures” defence.

Foreign FTP offence

In addition to the above requirements, there are additional elements needed to establish a Foreign FTP offence:

- "dual criminality" at each of the above two Stages (namely, the conduct of both the taxpayer and the “person associated” with the company must be recognised as criminal both in the UK and in the jurisdiction to which the foreign tax evasion relates); and
- a sufficient “UK nexus” (e.g.: the company is established or conducts business in the UK or the person associated with it carried out the criminal facilitation in the UK).

Any company (or other corporate body), whether UK or foreign, can commit the UK FTP offence. However, a foreign company (or other foreign corporate body) will only commit the Foreign FTP offence if there is a sufficient UK nexus.

A “person associated” with the company

A UK or foreign company can only be liable for acts of a person who commits a tax evasion facilitation offence “when acting in the capacity of a person associated” with that company. The key question is whether the person facilitates tax evasion whilst performing services for, or on behalf of, the company. The statutory test is very wide. Therefore, companies should consider whom they can control contractually, through their organisational structure or where they outsource services to others. (However, a company will not be liable if a “person associated” with it facilitates tax evasion in his/her private life or on “a frolic of their own”.) Examples of potential third party “persons associated” with a company include: intermediaries, joint venture partners and entities, subsidiaries, professional advisers and “back office”/outsourced services suppliers (e.g.: catering, IT, facilities and maintenance suppliers or HR/payroll providers).

Defence – reasonable prevention procedures

It is a defence for a company to prove that, at the time when a “person associated” with it facilitated the tax evasion offence, the company had in place prevention procedures that were reasonable in all circumstances. Therefore, each company should conduct a risk assessment to ascertain where “persons associated” with it could facilitate tax evasion and the type of policies and procedures that it should implement. The prevention procedures do not have to be fool-proof. It is sufficient if the procedures are...
"reasonable in all the circumstances". What is considered "reasonable in all the circumstances" will depend on the particular business of the company. (HMRC's guidance, which is currently still in a draft form, confirms that the procedures should be proportionate to the risk the company faces.) High-risk factors require more robust procedures. Common high risk factors include, for instance, country, sector, transaction or customer risks encountered by the company in its business. Hence, companies which operate in countries with high level of secrecy or used as a tax shelter, or in high risk sectors (e.g.: financial services or tax advisory services), or engage in high risk transactions (e.g.: high value projects, complex tax planning structures or supply chains, cash-intensive business or transactions involving intermediaries or numerous parties or jurisdictions), or transact with non-resident customers or customers with unusual ownership structures, will require more robust prevention procedures.

**HMRC’s Guidance**

HMRC's draft guidance: “Tackling tax evasion: Government guidance for the corporate offence of failure to prevent the criminal facilitation of tax evasion”, last updated in October 2016 (“HMRC’s Guidance”) includes six Guiding Principles: risk assessment, proportionality of risk-based prevention procedures, top level commitment, due diligence, communication (including training) and monitoring and review. HMRC’s Guidance is not prescriptive and is intended to be “flexible and outcome focused”. The term "reasonable prevention procedures" refers to both formal policies and the practical steps taken to enforce compliance.

Prevention procedures could, for instance, include formulating a formal policy on preventing the facilitation of tax evasion, putting in place disciplinary procedures for a breach by an employee, commitment not to recommend services of other organisations which do not have appropriate standards of tax evasion prevention, internal training for employees, due diligence on “persons associated” with the company, contractual terms and conditions of business with “persons associated” with the company, monitoring compliance and periodic reviews of prevention procedures.

**What action should UK and foreign companies take before 30 September 2017?**

UK and foreign companies should carry out a risk assessment to identify the areas of their business where there is a high risk of “persons associated” with them facilitating tax evasion. Senior management should have an oversight of the risk assessment and policy implementation stages. Each company should also decide how to address the identified risks and should put in place policies and procedures to mitigate such risks.
UK and foreign companies should have an action plan in place and should be implementing its prevention procedures by 30 September 2017 when the new FTP offences come into force.

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