THE FRAUD
LAWYERS ASSOCIATION

8.10.15

Dear Sirs

Response from the Fraud Lawyers' Association ('FLA') to the HMRC consultation paper dated 16th July 2015 entitled 'Tackling offshore tax evasion: A new criminal offence for offshore evaders"

This document is submitted by the FLA in response to the above named consultation.

The FLA is an organisation established in 2012 to educate and train its 350 members in all matters relating to their practice as fraud lawyers. Its membership consists of solicitors and barristers who practise mainly in the area of criminal and civil fraud: www.thefraudlawyersassociation.org.uk.

On 31st October 2014, the FLA submitted its response to the original consultation on this topic. In that response, the FLA set out its fundamental objection to the proposed new offence, such objection being based primarily (but not exclusively) on the strict liability aspect of it. In our submission, this concept is profoundly inconsistent with any offence of dishonesty, of which tax evasion is a prime example.

We understand from the latest consultation that the 'vast majority' of respondents (which included the Law Society, the Criminal Bar Association, the Bar Council, the British Bankers' Association, the ICAEW, the Tax Investigation Practitioners' Group and a number of high profile law firms) objected to the strict liability proposal. It was with a sense of frustration and disappointment, therefore, that we learned of the Government's intention to pursue this matter.

This is a decision which appears to have been taken without any regard for the significant body of opposition to this course, and without any reasoned explanation being given for it.

In those circumstances, we maintain our original stance on this issue and would urge the Government now to abandon this scheme. In making that request, we rely upon the contents of our earlier response dated 31st October 2014 and also the submissions made in our recent face to face meeting with HMRC on 30th September 2015.

Subject to those preliminary observations, our response to the specific questions posed by the latest consultation is set out below. To the extent that it is proposed by HMRC to cite our views on these issues, it should be made clear that we object to the scheme as a whole.

Q1. Do you agree that there should be a statutory defence of reasonable excuse for those parts of the offence arising from a failure to notify chargeability to tax and failure to file a return; and of reasonable care for that part of the offence arising from an inaccurate return?

Yes.

Q2. Are there any other legislative safeguards that should be included in the offence?

Given the potential for unfair outcomes and given further the breadth of prosecutorial discretion, the commencement of proceedings should be subject to the express (not delegated) consent of the DPP (ie by him/her in person).

There should be a minimum level of at least £75,000 of unpaid tax before a prosecution can commence.

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Q3. When HMRC cannot accurately apportion an item of income or a gain

between the UK and overseas, or between different overseas jurisdictions, how should that sum be taken into account when deciding whether tax understated exceeds the threshold amount? Do you agree that the use of a certification regime, as outlined above, would be an appropriate way forward?

No. There is no valid comparison between the use of such certificates under the Serious Crime Act 2007and this new proposed offence, not least because the relevant offences under the 2007 Act require mens rea. In circumstances where the new offshore offence is proposed to be of strict liability application, it should be entirely incumbent on the Crown to prove the constituent elements of it. This necessarily includes proving that the gains have arisen offshore.

This is particularly so in the light of para 2.16 of the original consultation document, where it was suggested that:

"The requirement to demonstrate the tax non-compliance - the actus reus - already sets a high bar for the prosecuting authority. There is no intention to remove or reduce this requirement, nor to change the standard or the burden of proof. It will still be for the prosecuting authority to demonstrate to the Criminal standard that the taxpayer ought to have declared taxable offshore income or gains, yet failed to do so."

Q4. Do you agree that overseas income and gains that are deemed to be that

of the taxpayer under various anti-avoidance provisions should be taken into

account in the normal way?

No. For the same reasons as given above, the deeming provisions should not apply.

Q5. Do you have any views, comments or evidence which may help inform our understanding of likely impacts?

See our objections in principle, as set out above.

Yours faithfully

pp Clare Huntley

The Fraud Lawyers' Association